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# Law Magazine and Review.

## • INDEX TO VOL. XXXVI, FIFTH SERIES, 1910-1911.

	PAGE
ACTIONS AGAINST EXECUTORS ... ..	23
AEROPLANE, TRESPASS BY ... ..	17
AMERICA, OBSCENE LITERATURE AND CONSTITUTIONAL LAW IN ... ..	459
AVIATION AND FUTURE LEGISLATION ... ..	176

### BOOKS REVIEWED:—

<i>A. B. C. Guide to Practice 1911</i> ... ..	116
<i>Addison's Law of Contracts</i> ... ..	503
AGGS, <i>The Annual Statutes 1910</i> ... ..	364
„ <i>The Finance (1909-10) Act</i> ... ..	111
„ <i>The Licensing (Consolidation) Act 1910</i> ... ..	252
ALEXANDER, <i>The Administration of Justice in Criminal Matters</i> ... ..	507
<i>Alpe's Stamp Duties</i> ... ..	381
<i>Annual County Courts Practice 1911</i> ... ..	241
<i>Annual Practice 1911</i> ... ..	116
<i>Archbold's Criminal Pleading, Evidence and Practice</i> ... ..	249
<i>Arnold's Law relating to Municipal Corporations</i> ... ..	244
ARUNACHALAM, <i>Digest of the Civil Law of Ceylon</i> ... ..	493
ATHERLEY JONES and BELLOT, <i>The Miner's Guide</i> ... ..	125
ATKINSON, <i>The Magistrate's General Practice</i> ... ..	376
BALDASSARI, <i>La Capacità patrimoniale della Donna mari- tata nel Diritto civile, &amp;c.</i> ... ..	127
BATY, <i>Britain and Sea Law</i> ... ..	494
BENEST, <i>An Alphabetical Guide to the Law of Costs</i> ... ..	123
BERRY, <i>Index to Income Tax Acts</i> ... ..	111
<i>Best on Evidence</i> ... ..	502
BEVERLEY, <i>Digest of Cases under the Workmen's Com- pensation Acts</i> ... ..	122
BEWES, <i>Stock Exchange Law and Practice</i> ... ..	110
BLAKE ODGERS, <i>The Common Law of England</i> ... ..	491
BOAS, <i>Guide to Land and Mineral Rights Duties</i> ... ..	251
BRAY, <i>Digest of the Law of Discovery</i> ... ..	380
<i>Broom's Legal Maxims</i> ... ..	372
<i>Butterworths' Twentieth Century Statutes 1910</i> ... ..	364

	PAGE
BOOKS REVIEWED ( <i>continued</i> )—	
<i>Butterworths' Workmen's Compensation Cases, Vol. III</i> ...	379
<i>Butterworths' Yearly Digest 1910</i> ... ..	364
BYLES and WATSON, <i>Bills of Exchange</i> ... ..	505
CAPORN, <i>Cases illustrating the Law of Contract</i> ... ..	497
CARSON and BOMPAS, <i>Real Property Statutes</i> ... ..	118
CARTER, <i>Elements of the Law of Contract</i> ... ..	242
CASSELS, <i>The Law relating to Hire and Hire Purchase</i> ...	508
Challis's <i>Law of Real Property</i> ... ..	499
CHAMBERS, <i>Outlines of Constitutional and Administrative Law</i> ... ..	380
CHAPMAN, <i>Marriage and Divorce</i> ... ..	363
COMBE, <i>The Law of Light</i> ... ..	492
COWAN, <i>The Lord Chancellors of Scotland</i> ... ..	359
COX-SINCLAIR and HYNES, <i>Land Values</i> ... ..	111
CURLEWIS and EDWARDS, <i>The Law of Prohibition</i> ... ..	492
DAVIDSON and WADSWORTH, <i>Precedents in Conveyancing</i> ...	374
DAWBARN, <i>Employers' Liability and Workmen's Compensation</i> ... ..	501
DEI. VECCHIO, <i>Il Fenomeno della Guerra e l'Idea della Pace</i> ...	254
„ <i>L'idée d'une Science du Droit Universel Comparé</i> ... ..	127, 382
DEVONSHIRE and SAMUEL, <i>Duties on Land Values</i> ... ..	111, 509
DUNSTAN, <i>Law relating to the Hire Purchase System</i> ... ..	122
EARNSHAW, <i>Voluntary Liquidation</i> ... ..	510
<i>Elphinstone's Precedents in Conveyancing (Supplement)</i> ...	111
EVANS and BARTON, <i>Land and Mineral Taxes</i> ... ..	111
EVERSLEY and CRAIES, <i>The Marriage Laws of the British Empire</i> ... ..	353
<i>Every Man's Own Lawyer</i> ... ..	380
FISHER, <i>F. W. Maitland: A Biographical Sketch</i> ... ..	109
„ <i>The Collected Papers of Frederic William Maitland</i> ...	495
<i>Fisher's Law of Mortgage</i> ... ..	370
FITZGERALD and QUIN, <i>The New Law regulating Assurance Companies</i> ... ..	114
FRASER, <i>The Law of Torts</i> ... ..	125
<i>Fry on Specific Performance</i> ... ..	501
FULLER, <i>The Law of Friendly Societies</i> ... ..	119
GERLAND, <i>Die Englische Gerichtsverfassung, eine systematische Darstellung</i> ... ..	126
GIBSON BOWLES, <i>Sea-Law and Sea Power</i> ... ..	238
GIDDEN, <i>The Charters of the Borough of Southampton</i> ...	363
GOADBY, <i>Introduction to the Study of Law</i> ... ..	117
GODDARD, <i>The Law of Easements</i> ... ..	120
GORE-BROWNE, <i>The Law relating to Assurance Companies</i> ...	240
GORE-BROWNE and JORDAN, <i>Handbook on Joint Stock Companies</i> ... ..	506
GOUDY, <i>Trichotomy in Roman Law</i> ... ..	251

BOOKS REVIEWED (*continued*)-

PAGE

GREENWOOD, <i>The Law relating to Trade Unions</i> ...	378
HALESBURY, <i>The Laws of England</i> ... ..	354
HARDY, <i>Six Roman Laws</i> ... ..	510
HARMAN, <i>The Finance Act 1894 and Subsequent Legislation</i> ... ..	111
HARTLEY, <i>Analysis of the Laws of Insurance</i> ... ..	509
HARVEY, <i>The Law of Registration of Title</i> ... ..	239
HASTINGS, <i>Korkunov's General Theory of Law</i> ... ..	117
HOLLAND, <i>Jurisprudence</i> ... ..	117
„ <i>Proposed Changes in Naval Prize Law</i> ... ..	494
HOOPER, <i>The Law of Illegitimacy</i> ... ..	507
Innes' <i>Digest of the Law of Easements</i> ... ..	381
Jarman on <i>Wills</i> ... ..	246
JONES, <i>The Solicitor's Clerk</i> ... ..	378
<i>Justice of the Peace and his Functions</i> ... ..	376
KING, <i>Alphabetical Stamp Guide</i> ... ..	122
„ <i>Costs on the High Court Scale</i> ... ..	123
KNOCKER, <i>Accidents in their Medico-Legal Aspect</i> ... ..	353
KNOWLES, <i>The Law relating to Electricity</i> ... ..	496
KONSTAM, <i>Land Values</i> ... ..	111
<i>Lawrance's Deeds of Arrangement</i> ... ..	125
LAWRENCE, <i>The Principles of International Law</i> ... ..	243
<i>Lewin's Law of Trusts</i> .. ..	504
LOVAT-FRASER, <i>Duties on Land Values</i> ... ..	111
MCCAUL, <i>Remedies of Vendors and Purchasers of Real Estate</i> ... ..	507
MACKENZIE, <i>The Overseer's Handbook</i> ... ..	252
<i>Madachlan's Merchant Shipping</i> ... ..	369
MACMORRAN, <i>Local Government 1910</i> ... ..	361
MALABARI, <i>Bombay in the Making</i> ... ..	115
MANSON, <i>A short View of the Law of Bankruptcy</i> ... ..	124
<i>Marsden on Collisions at Sea</i> ... ..	247
MARTIN, <i>The Record Interpreter</i> ... ..	123
MEARES, <i>The Law relating to Electrical Energy in India</i> ... ..	508
MEWS, <i>The Annual Digest 1910</i> ... ..	364
MOFFET, <i>Land Taxes and Mineral Right Duties</i> ... ..	111
MONTGOMERY and WOODCOCK, <i>The Annual Licensing Practice</i> ... ..	375
MORRIS, <i>The Frankpledge System</i> ... ..	377
NAPIER, <i>The New Land Taxes</i> ... ..	111
NIEMEYER, <i>Das Seekriegsrecht nach der Londoner Deklaration vom 26 Feb. 1909</i> ... ..	126
NORMAN, <i>A Digest of the Death Duties, Vol. I</i> ... ..	500
<i>Oke's Magisterial Formulist</i> ... ..	248
<i>Oswald's Contempt of Court</i> ... ..	120
PALMER, <i>Company Precedents, Part II</i> ... ..	248



	PAGE
BOOKS REVIEWED ( <i>continued</i> )—	
PAPPAPAVA, <i>Das Notariat in Russland</i> ... ..	253
„ <i>Das Notariat in San Marino</i> ... ..	126
„ <i>Das Urkund—und Beurkundungswesen in Montenegro</i> ... ..	253
„ <i>Le Notariat en Egypte</i> ... ..	512
PARSONS and ALLEN, <i>The Workmen's Compensation Act 1906</i> ... ..	367
Paterson's <i>Licensing Acts</i> ... ..	375
Paterson's <i>Practical Statutes</i> ... ..	509
PAULIAN, <i>La Recognizance dans le Droit Anglais</i> ... ..	511
PHILLIPSON, <i>The International Law and Custom of Ancient Greece and Rome</i> ... ..	362
PIGGOTT, <i>Extradition: The Law relating to Fugitive Offenders</i> ... ..	357
POLLOCK, <i>Principles of Contract</i> ... ..	372
POTTS, <i>Summary of the Leading Provisions of the English Law of Contract</i> ... ..	362
<i>Powell's Law of Evidence</i> ... ..	121
<i>Pratt and Mackenzie's Law of Highways</i> ... ..	373
<i>Pratt and Redman's Income Tax Law</i> ... ..	111
RENTON and PHILLIMORE, <i>The Comparative Law of Marriage and Divorce</i> ... ..	359
REUTERSKIÖLD, <i>Politisk Röstätt för Kvinnor</i> ... ..	382
RICCA-BARBERIS, <i>Il Diritto di togliere del Possessore e il Diritto di far togliere del Proprietario</i> ... ..	512
„ <i>Un Principio d'Equità, le Iniquità della sua Applicazione ed i suoi nuovi Atteggiamenti</i> ... ..	254
ROLIN, <i>Prolégomènes à la Science du Droit</i> ... ..	253
Rouse's <i>The Practical Man</i> ... ..	381
RUDALI and GREIG, <i>The Law of Trusts and Trustees</i> ... ..	368
Saint's <i>Registration Cases</i> ... ..	125
SALMOND, <i>Jurisprudence</i> ... ..	117
„ <i>The Law of Torts</i> ... ..	365
SCHOLEFIELD and HILL, <i>The Law relating to the Paving and Sewering of New Streets and Private Streets</i> ... ..	367
SCHROEDER, <i>“Obscene” Literature and Constitutional Law in America</i> ... ..	459
SCOTT, <i>The Visigothic Code</i> ... ..	358
SCRUTTON and MACKINNON, <i>Charter-parties and Bills of Lading</i> ... ..	371
SMITH, <i>Rule of the Road at Sea</i> ... ..	251
„ <i>The Law and Practice in Ecclesiastical Courts</i> ... ..	369
SIPAIGHT, <i>War Rights on Land</i> ... ..	495
Stone's <i>Justices' Manual</i> ... ..	376
STRACHAN, <i>A Digest of the Law of Trust Accounts</i> ... ..	379
STUBBS and BAXTER, <i>Irish Forms and Precedents</i> ... ..	241

BOOKS REVIEWED (*continued*)—

<i>Taylor's Medical Jurisprudence</i> ... ..	245
THWAITES, <i>Guide to Criminal Law and Procedure</i> ...	245
„ <i>Guide to the Law of Real and Personal Property and Conveyancing</i> ... ..	245
TILSCH, <i>Le Code Civil Général Autrichien son Origine et son Développement</i> ... ..	511
TOPHAM, <i>Principles of Company Law</i> ... ..	248
„ <i>Real Property</i> ... ..	511
TRUELOVE, <i>The Assurance Companies Act 1909</i> ... ..	114
VON LISZT, <i>Die Kriminelle Fruchtabtreibung</i> ... ..	382
WATTS, <i>The Assurance Companies Act 1909</i> ... ..	240
WEBSTER-BROWN, <i>Acts relating to Estate Duty</i> ... ..	111
WEHBERG, <i>Die Abkommen der Haager Friedenskonferenzen, der Londoner Seekriegskonferenz, nebst Genfer Konvention</i> ... ..	126
WHITELEY and LAMB, <i>The Licensing Acts</i> ... ..	375
WILLIAMS and YATES, <i>The Law of Ejectment</i> ... ..	498
WILLIS, <i>The Workmen's Compensation Act 1906</i> ... ..	381
WILSHERE, <i>Analysis of Williams' Law of Personal Property</i> ... ..	508
„ <i>Analysis of Williams' Law of Real Property</i> ... ..	124
WILSON, <i>Hand-book of International Law</i> ... ..	116
WOODBINE, <i>Four Thirteenth Century Law Tracts</i> ... ..	379
WROTTESELEY, <i>The Examination of Witnesses in Court</i> ... ..	121
WYLIE, <i>Land Values and Mineral Rights</i> ... ..	111
„ <i>Liquor Licence and other Duties under the Finance Act 1910</i> ... ..	252
<i>Yearly County Court Practice 1911</i> ... ..	241
<i>Yearly Practice of the Supreme Court 1911</i> ... ..	116
BROUGHAM AS AN ADVOCATE ... ..	36
CABINET SYSTEM IN ENGLAND, THE EVOLUTION OF THE ... ..	49
CIVIL JUDICIAL STATISTICS, 1909 ... ..	294
CODIFYING THE LAW OF ENGLAND, THE NEED FOR ... ..	129
COMMISSIONS AND "TIPS," THE LAW RELATING TO ... ..	302
CONSPIRACY IN CIVIL ACTIONS ... ..	151
CONSTITUTIONAL LAW AND OBSCENE LITERATURE IN AMERICA ... ..	459
CONTEMPORARY FOREIGN LITERATURE ... ..	126, 253, 382, 511
CONTRIBUTORS:—	
BARTLETT, C. A. HERESHOFF, <i>The Problem of Marriage and Divorce</i> ... ..	1

CONTRIBUTORS (*continued*)—

BELLLOT, HUGH H. L., <i>The Prerogative of the Crown and the House of Lords</i> , 65; <i>Early Law Schools in London</i> , 257; <i>Teaching by Moots</i> ...	445
BROWN, HENRY H., <i>Promises and Covenants</i> ...	141
BROWN, W. F. WYNDHAM, <i>The Evolution of the Cabinet System in England</i> ...	49
BRUNE, C. M., <i>The Origin and History of Succession in Roman Law</i> ...	429*
CLEAVE, J. K. F., <i>The Remuneration of Valuers</i> , 42; <i>On the Summoning of a Jury</i> ...	308
HART, WALTER G., <i>The Need for Codifying the Law of England</i> ...	129
LOVAT-FRASER, J. A., <i>Brougham as an Advocate</i> , 36; <i>The Law relating to Commissions and "Tips,"</i> 302; <i>Scarlett and his Methods</i> ...	407
MAHAFFY, R. P., <i>A Poll of the People</i> ...	195
MARSHALL, R. L., <i>English Franchise Law</i> ...	385
MARTIN, H. J. B., <i>The Place of Jurisprudence in Legal Education</i> ...	418
MARTIN, T. F., <i>Actions against Executors</i> ...	23
MEYER, H. G., <i>Trespass by Aeroplane</i> , 17; <i>Aviation and future Legislation</i> ...	176
NOLAN, R. S., <i>Conspiracy in Civil Actions</i> ...	151
SCHLOESSER, H. H., <i>The Prevention of Destitution</i> ...	181
STRAHAN, J. ANDREW, <i>Obscene Literature and Constitutional Law in America</i> ...	459
WILLIAMS, JAMES, <i>Contemporary Foreign Literature</i> ...	126
	[253, 382, 511
COVENANTS AND PROMISES	141
CRIME, THE PREVENTION OF, AND THE REFORMATION OF CRIMINALS	315
CRIMINAL STATISTICS, 1909	284
CROWN, THE PREROGATIVE OF, AND THE HOUSE OF LORDS	65
CURRENT NOTES ON INTERNATIONAL LAW	86, 211, 326, 464
DESTITUTION, THE PREVENTION OF	181
DIVORCE, THE PROBLEM OF MARRIAGE AND	1
EARLY LAW SCHOOLS IN LONDON	257
ENGLISH FRANCHISE LAW	385
EVOLUTION OF THE CABINET SYSTEM IN ENGLAND	49
EXECUTORS, ACTIONS AGAINST	23

	PAGE
FOREIGN LITERATURE, CONTEMPORARY ...	126, 253, 382, 511
FRANCHISE LAW, ENGLISH ... ..	385
HOUSE OF LORDS, THE PREROGATIVE OF THE CROWN AND THE ... ..	65
INTERNATIONAL LAW:—	
• BILLS OF EXCHANGE—THE HAGUE CONFERENCE ...	93
CONTRABAND—BISMARCK AND RICE ... ..	333
DECLARATION OF LONDON ... ..	330, 473
DECLARATION OF PARIS IN DANGER ... ..	335
EXTRADITION ... ..	466
EXTRADITION BY COMITY ... ..	86
FLUSHING DEFENCES ... ..	217
FOREIGN CITATION ... ..	212
INTERNATIONAL LAW ASSOCIATION, LONDON CONFER- ENCE ... ..	77
“KNIGHT COMMANDER” CASE ... ..	211
LOCALISM ... ..	215
NETHERLANDS JURISTS ... ..	335
NEWFOUNDLAND ARBITRATION ... ..	90
OCCUPATION ... ..	214
PATENTS WORKED ABROAD ... ..	464
PENAL JUDGMENTS... ..	465
SAVARKAR CASE ... ..	326
SEPARATE DOMICILE ... ..	473
STATUS, CONTRACT AND PROPERTY ... ..	467
INTERNATIONAL LAW, CURRENT NOTES ON ...	86, 211, 326, 464
INTERNATIONAL LAW ASSOCIATION, LONDON CONFERENCE	77
JUDICIAL STATISTICS, ENGLAND AND WALES, 1909 ...	284
JURISPRUDENCE, THE PLACE OF, IN LEGAL EDUCATION ...	418
JURY, ON THE SUMMONING OF A ... ..	308
LAW RELATING TO COMMISSIONS AND “TIPS” ... ..	302
LAW SCHOOLS IN LONDON, EARLY ... ..	257
LEGAL EDUCATION, THE PLACE OF JURISPRUDENCE IN ...	418
LEGISLATION, AVIATION AND FUTURE ... ..	176
LONDON CONFERENCE OF THE INTERNATIONAL LAW ASSO- CIATION ... ..	77
MARRIAGE AND DIVORCE, THE PROBLEM OF ... ..	1
NEED FOR CODIFYING THE LAW OF ENGLAND ... ..	129
NOTES ON RECENT CASES ... ..	94, 220, 337, 474
OBSCENE LITERATURE AND CONSTITUTIONAL LAW IN AMERICA	459

	PAGE
ON THE SUMMONING OF A JURY ... ..	308
ORIGIN AND HISTORY OF SUCCESSION IN ROMAN LAW ...	429
PLACE OF JURISPRUDENCE IN LEGAL EDUCATION ... ..	418
POLL OF THE PEOPLE ... ..	195
PREROGATIVE OF THE CROWN AND THE HOUSE OF LORDS	65
PREVENTION OF CRIME AND THE REFORMATION OF CRIMINALS	315
PREVENTION OF DESTITUTION ... ..	181
PROBLEM OF MARRIAGE AND DIVORCE ... ..	I
PROMISES AND COVENANTS ... ..	141

## RECENT CASES :—

<i>Angel v. Jay</i> ... ..	478
<i>Attorney-General v. M'Carthy</i> ... ..	490
<i>Baker v. Jewell</i> ... ..	226
<i>Barrance, In re, Barrance v. Ellis</i> ... ..	221
<i>Baskerville, In re, Baskerville v. Baskerville</i> ... ..	100
<i>Bath v. Standard Land Company</i> ... ..	220, 477
<i>Bridgewater's Estate, In re</i> ... ..	101
<i>British South Africa Co. v. De Beer's Consolidated Mines Ltd.</i> ... ..	223
<i>Bruen's Estate, In re</i> ... ..	352
<i>Butler v. Rice</i> ... ..	101
<i>Cade v. Daly</i> ... ..	108
<i>Caledonian Railway v. Glenboig Union Fireclay Co.</i> ...	231
<i>Campbell v. Paddington Corporation</i> ... ..	481
<i>Cavan County Council v. Kane</i> ... ..	235
<i>Central London Railway v. City of London Land Tax Commissioners</i> ... ..	475
<i>Clelland v. Robb</i> ... ..	487
<i>Cloutte v. Storey</i> ... ..	337
<i>Coaker v. Willcocks</i> ... ..	480
<i>Cohen, In re, Brookes v. Cohen</i> ... ..	338
<i>Connolly Brothers, In re</i> ... ..	478
<i>Cook v. Hobbs</i> ... ..	341
<i>Cook v. Truener</i> ... ..	341
<i>Crookston Brothers v. Furtado</i> ... ..	347
<i>Cummings v. Stewart</i> ... ..	489
<i>Dawson &amp; Co. v. Bingley Urban District Council</i> ...	482
<i>Denaby &amp; Cadeby Main Collieries v. Anson</i> ... ..	343
<i>Donoughmore's Estate, In re</i> ... ..	488
<i>East v. Bennett Brothers</i> ... ..	339
<i>Eke v. Hart Dyke</i> ... ..	226
<i>Evans and Bettell's Contract, In re</i> ... ..	222
<i>Evered, In re, Molineux v. Evered</i> ... ..	99
<i>Garde Browne, In re</i> ... ..	488

RECENT CASES (*continued*)—

<i>General Billposting Co. v. Youde</i> ... ..	103
<i>Glasgow Parish Council v. Martin</i> ... ..	233
<i>Gray v. Provost of Trinity College Dublin</i> ... ..	235
<i>Griffith's Settlement, In re, Griffiths v. Waghorne</i> ... ..	338
<i>Hall v. Hall</i> ... ..	478
<i>Hartland, In re, Banks v. Hartland</i> ... ..	474
<i>Heeney v. Addy</i> ... ..	236
<i>Hobbs v. Winchester Corporation</i> ... ..	96
<i>Hoyles, In re, Row v. Jagg</i> ... ..	339
<i>Hudson v. Spencer</i> ... ..	101
<i>Jones v. Jones</i> ... ..	96
<i>Kelleher, In re</i> ... ..	350
<i>Keogh v. Dental Hospital</i> ... ..	237
<i>Kish v. Taylor</i> ... ..	97
<i>Kitchenham v. Owners of s.s. "Johannesburg"</i> ... ..	343
<i>Lacon's Settlement, In re</i> ... ..	478
<i>Laird v. Bank of Scotland</i> ... ..	101
<i>Lamont v. Rodger</i> ... ..	483
<i>Leach v. Oakley Street &amp; Co.</i> ... ..	343
<i>Leslie's Hassop Estates, In re</i> ... ..	476
<i>L'Estrange v. Winniett</i> ... ..	351
<i>London &amp; South Western Canal, In re</i> ... ..	340
<i>Lurcott v. Wakeley &amp; Wheeler</i> ... ..	479
<i>M'Cartan v. Belfast Harbour Commissioners</i> ... ..	107
<i>McConnell &amp; Reid v. Smith</i> ... ..	486
<i>Marjoribanks and others (Trustees of the Duart Bursary Fund)</i> ... ..	234
<i>Masters' Settlement, In re</i> ... ..	338
<i>Moore v. Manchester Liners</i> ... ..	227
<i>Mordaunt Brothers v. British Oil and Cake Mills</i> ... ..	97
<i>Neale v. City of Birmingham Tramways Co.</i> ... ..	223
<i>North British Distillery Company v. Assessor for Edinburgh</i> ... ..	346
<i>Oddy, In re</i> ... ..	476
<i>Parish Councils of Glasgow and Govan v. Assessor for Glasgow</i> ... ..	486
<i>Park, In re, Bott v. Chester</i> ... ..	99
<i>Parker v. Jones</i> ... ..	95
<i>Patten v. Hamilton</i> ... ..	349
<i>Prested Miners Co. v. Garner</i> ... ..	226
<i>Renton v. Ramage</i> ... ..	233
<i>Rex v. Ellis</i> ... ..	228
<i>Rex (Martin) v. Mahony</i> ... ..	236
<i>Rex (Pawley) v. Local Government Board</i> ... ..	106
<i>Robb v. Watson</i> ... ..	105
<i>Robinson, In re, McLaren v. Public Trustee</i> ... ..	476

RECENT CASES (*continued*)—

<i>Rosefield v. Provincial Union Bank</i> ... ..	229
<i>Rourke v. Robinson</i> ... ..	478
<i>Sapwell v. Bass</i> ... ..	98
<i>Seabrook, In re, Gray v. Baddeley</i> ... ..	338
<i>Seldon v. Wilde</i> ... ..	94
<i>Shepherd v. Croft</i> ... ..	478
<i>Smith v. Cock</i> ... ..	474
<i>Smith &amp; Sons v. Buchanan</i> ... ..	485
<i>Strutt v. Clift</i> ... ..	341
<i>Tebrau Rubber Syndicate v. Farmer</i> ... ..	232
<i>Thompson v. Kindell</i> ... ..	347
<i>Tolpuitt &amp; Co. v. Mole</i> ... ..	342
<i>Waters v. Lloyd</i> ... ..	489
<i>Watkin's Settlement, In re, Wills v. Spence</i> ... ..	339
<i>Weir Hospital, In re</i> ... ..	98
<i>Whitehorn Brothers v. Davison</i> ... ..	344
<i>Whiteman v. Sadler</i> ... ..	224
<i>Whitfield, In re, Hill v. Mathie</i> ... ..	339
<i>Williams' Settled Estate, In re</i> ... ..	222
<i>Willmott v. London Road Car Co.</i> ... ..	224
<i>Woodbridge &amp; Sons v. Bellamy</i> ... ..	340
<i>Young v. Brownlee</i> ... ..	484
RECENT CASES, NOTES ON ... ..	94, 220, 337, 474
REFORMATION OF CRIMINALS, PREVENTION OF CRIME AND	315
REMUNERATION OF VALUERS ... ..	42
REVIEWS ... ..	109, 238, 353, 491
ROMAN LAW, THE ORIGIN AND HISTORY OF SUCCESSION IN	429
SCARLETT AND HIS METHODS ... ..	407
STATISTICS, ENGLAND AND WALES, 1909, CIVIL ... ..	294
"      "      "      "      CRIMINAL ... ..	284
SUCCESSION IN ROMAN LAW, THE ORIGIN AND HISTORY OF	429
TEACHING BY MOOTS ... ..	445
"TIPS" AND COMMISSIONS, THE LAW RELATING TO ... ..	302
TRESPASS BY AEROPLANE ... ..	17
VALUERS, THE REMUNERATION OF ... ..	42

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## I.—THE NEED FOR CODIFYING THE LAW OF ENGLAND.

“OF the laws of England:” wrote Sir Francis Bacon, “I have commended them before for the matter, but surely they ask much amendment for the form; which to reduce and perfect I hold to be one of the greatest doweries that can be conferred upon this Kingdom.” The lapse of three hundred years has made but little change in the position of affairs, and were Bacon writing in the year 1911 he might let the passage go without alteration of a word, save that some might think it expressed too mildly. For the enormous increase in the bulk of the English law which has taken place during the last hundred years greatly accentuates the defects of its form. “Chaos tempered by *Fisher’s Digest*,” as some epigrammatist described it, remains substantially an accurate representation of its condition.

Roughly speaking, the law of England is contained in the Acts of Parliament from the reign of Henry III to the present time, and the decisions of the superior courts of justice commencing with the *Year Books* and continuing to the present day. The Acts of Parliament are to be found in the *Statutes at Large*, of which Ruffhead’s edition is contained in eighteen large quarto volumes. This, however, only includes the statutes down to the forty-first year of George III, *i. e.*, 1800. But the work was continued by



various editors for the period between that date and the year 1869, making twenty-nine volumes more, or thirty including the index volume. To these must be added one volume, issued by the King's Printers, for each of the succeeding years, making eighty-seven volumes in all down to the end of 1909. These volumes contain only the public general Acts and not local or personal Acts, except that, down to the year 1798, the great majority of Acts now classed as local were included among the public Acts.<sup>1</sup>

Many of these enactments have been wholly or in part repealed, or have spent their force, and an edition of the statutes revised so as to exclude repealed and obsolete matter was officially published in 1878, a second edition being issued in 1886 which has been continued to the year 1900. This second edition of the statutes, revised with the supplements, is contained in twenty royal octavo volumes, and gives all public general Acts of Parliament from the commencement of the reign of Henry III down to the year 1900, which had not been repealed at the date of the publication of each volume. Adding the ten volumes necessary to bring the compilation down to date the smallest compass in which the Statute-law can be found is thirty large octavo volumes.

The decisions of the Superior Courts of Justice which are reckoned as establishing law are contained in an infinitely larger number of books. A very eminent authority, Sir Frederick Pollock, reckoned that down to the end of the year 1895 the volumes of reports are something over eighteen hundred, if we count English reports alone.<sup>2</sup> But it is often necessary to refer to decisions of

<sup>1</sup> Ilbert, *Legislative Methods and Forms*, p. 28. Some of the earliest enactments are of doubtful authenticity as statutes, *ibid.*, p. 22.

<sup>2</sup> Sir Frederick Pollock, *First Book of Jurisprudence*, p. 295. That the figures here given are within this mark is confirmed by the fact that in *The Lawyers' Reference Book*, published by Sweet & Maxwell, Ltd., in 1907, references are given to just over 2,500 volumes of reports of cases in the Superior Courts in England and Wales.

Scotch and Irish courts, and sometimes to those of the English-speaking Colonies and the United States, too; and the same authority says that we shall not be far wrong in saying that on the whole there are now in print not far from eight thousand volumes of reported decisions.

This was at the end of the year 1895, so that now the number is vastly larger, for the output of Case-law is increasing at a prodigious rate. To confine the matter to England alone, every year the Council of Law Reporting issues six more or less bulky volumes of reports, and there are many other volumes issued by the proprietors of legal journals and by other publishers.

It is true, as Sir Frederick Pollock says, that the total substance of reported cases is not quite so huge as it seems, for even among the earlier books many cases are reported twice or oftener by different reporters; and in modern times we have series of rival reports, which, although they differ more or less in their selection of cases, have a greater part of their matter in common. But, even after making all allowances, the number of volumes in which our Case-law is contained is already appalling, and is increasing so rapidly that before long scarcely any library will be large enough to contain it all.

Nor does this complete the tale. An immense amount of law is now made by subordinate legislatures under statutory powers, in the shape of rules and bye-laws, such for example as the rules of the Rule Committee appointed under the Judicature and County Courts Acts, or that appointed under the Land Transfer Acts, and the bye-laws issued by Town and County Councils and other bodies.

Some of these are just as important as the Statute-law itself, and they also are of immense bulk. Take the Rules of the Supreme Court, for example. In the first volume of the *Annual Practice* for 1910 there are set out 1,045 rules of procedure. To these there are added in the second

volume fifteen long appendices and numerous supplementary rules relating to special matters.

To add to the "*immensa moles*," there is a great deal of needless prolixity about the statute book. It is true that during the last half-century a very large amount of valuable work for the purpose of ridding it of useless and redundant matter, of consolidating existing statutes and of improving the form of Acts of Parliament has been done,<sup>1</sup> but even now much of the older Statute-law is absurdly verbose and diffuse. In fact, it is only within quite recent times that Acts of Parliament have been framed in concise and simple language. The Tudor period is specially bad in this respect. The meaning of an enactment is often almost submerged in a perfect deluge of language frequently of a vituperative character. Take, for example the famous Statute of Uses, passed in the twenty-seventh year of Henry VIII (1535). The Legislature wished to enact that where any person is seised of any lands or other hereditaments to the use, trust, or confidence of any other person, such last-mentioned person shall be deemed to be seised of the same for all purposes of the law for the like estate as he had in use, trust, or confidence. This is the way it proceeded to express itself:—

"Where by the cōmon lawes of this realme landes tenementes and hereditamentes be not divisible by testament, nor ought to be transferrid frome one to a nother but by solemne lyv'y and scason matter of recorde wryting suffycient made bona fide without covyne or fraude, yet nevtheles dyverse and sundry ymaginacions subtile invencions and practises have bene usid, whereby the heredytamentes of this realme have bene conveyed frome one to an other by fraudulent cooffementes fynes recoyves and other assurances craftely made to secrete uses intentes and trustes, and also by wylles and testamentes sumtyme made by nude pōlx and wordes somtyme by signes and tokens and somtyme by wrytyng, and for the moste parte made by such psones as be visited with sykenes, in their extreme

<sup>1</sup> See Ilbert, *supra*, ch. iv.

agonyes and peynes or at such tyme as they have hadde scantlye  
 eny good memorie or remembrance ; at whiche tymes they beyng  
 pvokid be gredye covetous psones lyeing in a wayte about them do  
 many tymes dyspose indiscretely and unadvisidly theyr landes and  
 inheritances ; by reason whereof and by occasion of which fraudulent  
 feoffment<sup>e</sup> fynes reco<sup>v</sup>eys and other lyke assuraunc<sup>e</sup> to uses con-  
 fydences and trust<sup>e</sup> dy<sup>v</sup>s and many heires have bene unjustlye at  
 sundry tymes disherited, the lordes have lost theyr wardes mariages  
 relyefes harrottes eschetes aydes pur fayre fitz chyvaler & pur file  
 maryer, and scantlye any pson can be certaynly assurid of any  
 lands by them p<sup>r</sup>chased nor knowen surelye agayn whome they shal  
 use theyr accions or execucions for theyr rightes titles and duties ;  
 also men maryed have lost theyr tenancies by the courtesie, women  
 theyr dowers, manyfest p<sup>r</sup>juries by triall of such secrete willes and  
 uses, have bene comyttid, the Kyng<sup>e</sup> Highnes hathe lost the p<sup>r</sup>ffit<sup>e</sup>s  
 and advauntages of the landes of psones atteyntid, and of the landes  
 craftelye put in feffement to the uses of alyens borne, and also the  
 p<sup>r</sup>ffit<sup>e</sup>s of waste for a yere and a daye of landes of felones atteyndid,  
 and the lordes theyr eschetes thereof, and many other inconveniences  
 have happened and dayly do encrease amonge the Kynges subjects,  
 to theyr greate trouble and inquietnes, to the utter sub<sup>v</sup>sion of the  
 auneynt common lawes of this realme ; for the extirpyng and ex-  
 tinguysment of al such subtile practised feffementes fynes reco<sup>v</sup>eys  
 abuses and errors heretobefore usid and accustomed in this realme,  
 to the sub<sup>v</sup>sion of the good and auneynt lawes of the same, and to  
 thintent that the Kynges Highnes or any other his subjectes of this  
 realme shall not in any wise hereafter by any meanys or invencions  
 be deceyvid damaged or hurted by reason of such trustes uses or  
 confidences, it may please the Kynges most royall Majestie that it  
 may be enacted by his Highnes by thassent of the lordes spyrituall  
 & temporall and the comons in this p<sup>r</sup>sent Parlyament assumbyld  
 and by auctorite of the same in maner and fourme folowing that  
 is to saye : that where any pson or psones stand or be seased or at  
 any tyme hereafter shall happen to be seased, of and in any honours  
 castelles manoures landes tenement<sup>e</sup> rentes servyces reco<sup>v</sup>cions re-  
 maynders or other hereditament<sup>e</sup>, to the use confidence or trust of  
 any other parson or parsones or of anye bodie polytike, by reason  
 of any bargayne sale feffement fyne reco<sup>v</sup>y covenaunte cont<sup>r</sup>acte  
 agreement will or otherwise by anye maner meanes what so ev<sup>r</sup> it be,  
 that in ev<sup>r</sup>y suche case all and ev<sup>r</sup>y suche pson & psones & bodyes

polytyke that have or hereafter shall have any such use confidence or truste in fee symple fee tayle for tyme of lyf or for yeres or otherwyse, or any use confidence or trust in remaynder or reverter, shall from hensforth stonde and be seasid demed and adjudged in lawfull season estate and possession of and in the same honours castels manors landes tenementes rentes servyces receiveries remaynders and hereditamentes with theyre appoyntmentes to all intents constructions and purposis in the lawe, of and in suche lyke estates as they had or shall have in use trust or confidence of or in the same. And that the estate right title and possession that was in suche person or persons that were or shalbe hereafter seasid of any landes tenementes or hereditamentes, to the use confidence or trust of any such person or persons or of any bodye polytyke, be from hensforth clerelye demed and adjudged to be in hym or them that have or hereafter shall have suche use confidence or trust, after such qualytye manner fourme and condicion as they had before in or to the use confidence or trust that was in them."

Another example is to be found in the statute 13 Elizabeth, c. 5, passed to provide that all dispositions of property made with intent to delay or defraud creditors, should be void as against the person delayed or defrauded. The first section by which this purpose is effectuated is as follows:—

"For the avoyding and abolysshing of fained covenous and fraudulent feoffmentes gyftes grauntes alienations conveyances bondes suites judgements and executions, aswell of landes and tenementes as of goodes and catals, more commonly used and practysed in these dayes, then hathe ben seene or hard of heretofore; with feoffmentes gyftes grauntes alienations conveyances bondes suites judgmentes and executions have ben and are devysed and contrived of malyce fraude covyne collusion or guyle to thend purpose and intent to delaye hynder or defraude creditors and others of theyre juste and lawfull actions suites debtes accomptes damages penalties forfeitures heriotte mortuaries and releefes, not onely to the let or hindruance of the due course and execution of lawe and justyce, but also to the overthrowe of all true and playne dealyng barganyng and chevysaunce betwene man and man, without the which no common welth or civile societie can be mayntayned or contynued. Bee yt therefore declared ordeyned

and enacted by thauthoritie of this present Parliament, that all and every feoffement gyfte graunte alienation bargayne and conveyance of landes tenement<sup>e</sup> hereditament<sup>e</sup> goodes and catalls or of any of them, or of any lease rent cōmon or other pfyte or charge oute of the same landes tenem<sup>te</sup> hereditament<sup>e</sup> goode<sup>e</sup> and catals or any of them, by wryting or otherwyse, and all and every bonde suite judgem<sup>t</sup> and execution at any tyme, had or made sithens the begynninge of the Queenes Ma<sup>ty</sup> raigne that nowe is or at any tyme hereafter to be had or made, to or for any intent or purpose before declared and expressed, shalbe from henceforth deemed and taken, onely as againste that pson or psons his or theyre heyres successors executors admīstrators and assignes and every of them, whose actions suites debtes accomptes damages penalties forfaiture heriott<sup>e</sup> mortuaries and releyfes, by such guylefull covenous or fraudulent devyses and practyses as is aforesaid, are shall or mought be in any wyse dysturbed hyndred delayed or defrauded, to be clearly and utterly voyde frustrate and of none effecte; any pretence color fayned consideration expressing of use or any other matter or thyng to the contrary notw<sup>th</sup>standing."

This is the form in which these statutes are still to be found in the statute book.

Many other examples of exuberant verbosity might be cited, such as the Sculpture Copyright Act, 1814, of which Sir James Stephen says it "is a miracle of intricacy and verbosity. It contains an 'of' which may be a misprint, as it seems to make nonsense of several lines, and a most puzzling 'such.' . . . The section forms a sentence of thirty-eight lines, the first half of which is repeated in the second half in so intricate a way that the draftsman appears to have lost himself in the middle of it. It admits a doubt whether a cast from nature of an animal is the subject of copyright at all, and whether it must not be a cast from a cast from nature."<sup>1</sup>

The state of the Case-law is from the nature of things much worse than that of the Statute-law. Vast numbers of the decisions reported are obsolete, "rendered useless,"

<sup>1</sup> Quoted in *Scrutton on Copyright*, 4th ed., 202.

to quote from the report of the Royal Commission referred to below, "by statutes, amendments of the law and repeal of the statutes on which they have been decided or otherwise, some have been reversed on appeal or over-ruled in principle, some are inconsistent with others, and many are of no value for other reasons, and all this matter remains incumbering the books of reports."

The only possible cure for all this is codification. The word codification was invented or adapted by Bentham<sup>1</sup> close on a hundred years ago, and is now used to mean the orderly exposition of the principles and general rules of law in the form of statutory enactment. Bentham conceived of a code which should be complete and all-sufficing, and which would reduce the office of the lawyer to the ministerial duty of applying its provisions to the case before him. The present generation, however, takes a more modest view of the possibilities of codification, and aims only at the statement in the form of statutory enactment of the principles and general rules of the existing law in words which shall be as clear and precise as the infirmities of human language permit. "We know," as a very learned writer has said, "that enacted law is most useful if confined to the statement of general principles, and that the more it descends into details the more likely it is to commit blunders, to hamper action, and to cramp development."<sup>2</sup>

Yet the progress made in codification of this comparatively modest kind is singularly slow in this country. France, Germany, and most of the Continental States have now got scientific codes, and quite recently Japan has followed their example, while even our own Colonies and dependencies, and many of the States of the American Union, are in advance of ourselves in this respect.

It is true that even in England some efforts have been

<sup>1</sup> See the *Oxford English Dictionary*, s. v.

<sup>2</sup> Ilbert, *Legislative Methods and Forms*.

made and some progress has been achieved. Large branches of the Statute-law have been re-enacted from time to time in a consolidated form under the auspices of the Statute Law Commission and its successor, the Statute Law Committee,—two striking examples being the Merchant Shipping Act 1894, of 748 sections and 22 schedules, and the Companies (Consolidation) Act 1908, of 296 sections and six schedules.

Moreover, some big schemes for dealing with Case-law have been put forward from time to time. In 1866, at the instance of Lord Westbury, a Royal Commission was appointed to inquire into the then state of the law, with a view to its simplification. The Commission included some of the most eminent lawyers of the day, consisting as it did of Lord Cranworth (Chairman), Lord Westbury, Sir Hugh Cairns (afterwards Lord Cairns), Sir J. P. Wilde (afterwards Lord Penzance), the Right Hon. Robert Lowe (afterwards Lord Sherbrooke), Sir Page Wood (afterwards Lord Hatherley), Sir George Bowyer, Sir Roundell Palmer (afterwards Lord Selborne), Sir J. G. Shaw Lefevre, Sir Thomas Erskine May (afterwards Lord Farnborough), Mr. W. T. S. Daniel, Q.C., Mr. Henry Thring (afterwards Lord Thring), and Mr. (afterwards Sir) F. S. Reilly; and subsequently, Mr. Justice Willes and Sir H. S. Maine were made members. The purpose of the Commission was, "To inquire into the expediency of a Digest of law and the best means of accomplishing that object, and of otherwise exhibiting in a compendious and accessible form the law as embodied in judicial decisions." The Commission, under powers conferred on them in 1867, had some specimen portions of the Digest which they proposed, prepared under their supervision, but the work was found to involve considerable delay and expense, and in 1870 the Commissioners reported that a body should be constituted of the most highly skilled persons whose services could be procured, not exceeding



three in number, to be charged with the duty of executing the Digest as a whole, being provided with the necessary means and assistance, and acting under such directions and control either of the Privy Council or otherwise as might be thought fit. But there, unhappily, the matter ended. Nothing was done upon the report, and nothing resulted from the labours of the Commission, except the production of an excellent text-book on the Law of Easements.<sup>1</sup>

In 1871, Sir James Fitzjames Stephen drew a Bill to codify the law of evidence, which was introduced in the House of Commons by the late Lord Coleridge, then Attorney-General, but it got no further than a first reading, and has never been published, though Stephen's *Digest of the Law of Evidence* was based upon its clauses. Again, in the early eighties the same distinguished lawyer framed a code of Criminal law and Procedure, which was introduced into Parliament and referred to a Select Committee, where it made shipwreck in consequence of the difference of opinion to which its provisions gave rise among the members of the Committee. The well-known Digests of Criminal law and Procedure, by Sir J. F. Stephen, were the only outcome.

In the meantime, Sir Mackenzie Chalmers had prepared a bill to codify the law relating to bills of exchange, cheques, and promissory notes, which had a more fortunate issue, being in due course passed into law as the Bills of Exchange Act 1882. This was followed by the Bill codifying the law of partnership, drawn by Sir Frederick Pollock, which after many years of consideration ultimately became the Partnership Act 1890, the Bill to codify the law relating to the sale of goods which became the Sale of Goods Act 1893, and the Bill to codify the law relating to marine insurance which was passed into law as the Marine Insurance Act 1906—both the last having been drawn by Sir Mackenzie

<sup>1</sup> *The Law of Easements*. By J. L. Goddard. Seventh edition. 1910.

Chalmers, who has thus been much the most successful of our codifiers so far. The form in which these statutes have codified the law with which they deal is to reproduce as exactly as possible the existing law, save in respect of a few matters of uncontroversial character, in which amendment was feasible without raising opposition; and the success which has attended them seems to have disposed, by the test of practical experience, of the arguments advanced against the system so far as they are applicable to codification of this kind.

Since these Acts, one or two further attempts to codify certain branches of the law have been made. In 1907 a Bill to codify the law relating to trusts and trustees was introduced in the House of Commons by Mr. Athelstan Rendall, and though no opportunity occurred for proceeding with it that year, it was re-introduced in 1908, read a second time, and referred to a Select Committee. The Committee made a report to which was added an appendix containing the Bill, with certain provisional amendments upon which they requested the Attorney-General to obtain criticisms from legal experts and practitioners. In response to the invitation issued by the Attorney-General, replies were received from numerous legal authorities and distinguished lawyers, some favourable, but others wholly opposed to the attempt to codify the law at all,—and as a consequence the Bill has been dropped.

The latest attempt of all is a Bill to codify the law relating to perjury, introduced by the Lord Chancellor in the House of Lords only this year. What its ultimate fate may be is at present uncertain.

The results achieved by the codifiers are therefore hardly commensurate with their labours.

Why is it that so little progress has been made? The reason apparently is that there is as yet no sufficient body of public opinion in favour of it. The lay public is probably

favourable to the idea, but is apathetic. It has long ago abandoned any hope of being able to deal with the amendment of so intricate, complicated, and cumbrous a subject as the law of England. It feels that it is a matter it must leave to experts, the legal profession,—and the legal profession is on the whole opposed to codification. Many still fear that a code would lack the flexibility of uncodified law and would stifle development. This has always been the main contention of those opposed to codification from the time of Savigny onwards, but its fallacy is proved by the test of experience. There is nothing to suggest that the growth of law has been stifled in those countries which have codes, and Savigny's own country has framed and passed into law the completest and most scientific series of Codes that have ever been promulgated. No country that has codified its law has ever indicated the slightest desire to revert to the uncoded system.

The efforts of reformers must therefore be directed towards overcoming this sentimental objection and to creating a body of professional opinion in their favour. When such a body of opinion has been formed, the battle will have been won.

One reason, and perhaps it is the most forcible of all, for keeping the codification of English law continually in view is its influence on the unification of law throughout the Empire. Most of the improvements in the form of the English law are followed after no long interval by substantially identical legislation in the English-speaking Colonies. The Bills of Exchange Act, the Partnership Act, and the Sale of Goods Act, for example, have been adopted almost everywhere in the British dominions, and the first named has largely influenced the enactment of the Negotiable Instruments law, which has now been adopted in nearly all the States and territories of the American Union.

Codification is therefore a by no means unimportant

instrument for strengthening the tie that unites the British dominions beyond the seas to the Motherland, and although this may make it wise to proceed with the work with caution, it affords a very strong reason for proceeding with it steadily and persistently.

It is here suggested that the time has come when a Royal Commission should be appointed to inquire and report what parts of the law are ripe for codification on the lines of the statutes mentioned above, and to prepare drafts of the codes they recommend, and that these drafts should then be submitted to Parliament as Government measures by the law officers of the Crown.

WALTER G. HART.

## II.—PROMISES AND COVENANTS.

ACCORDING to proverbial wisdom, promises are made to be broken, and lawyers are perhaps to be excused if, looking at the matter from a purely professional standpoint, they regard this as a happy circumstance. The greater part of the law is based upon promises, and upon these reciprocal promises which are called covenants, and therefore breach of promise and covenant is, directly or indirectly, responsible for the greater part of the litigation with which courts of justice are concerned.

Apart from the vast body of transactions which are founded upon pure contracts,—such as sale, hiring, lending, marriage, and partnership,—it must be remembered that wherever there is a power there is a corresponding duty, wherever there is a right there is a counterpart obligation, and each of these implies a hypothetical covenant between the State and the subject, or between the subjects *inter se*. This reflection opens up a vista so long and so wide, that my readers will not expect an invitation to accompany me on a further progress along it.

My attention has been more particularly drawn to this immense subject by perusal of one of the celebrated law tracts of Lord Kames on "The History of Promises and Covenants." I was permitted some time ago, in the pages of this Review, to discuss another of those law tracts on "The History of the Criminal Law," or, to speak more accurately, on the development of criminal punishment. In that article I said all that was necessary respecting the life and work of Lord Kames, and I need only here remind the reader that his lordship was a distinguished Scottish judge, philosopher, and critic of the eighteenth century, and one of the leaders of the literary coterie that received Dr. Johnson on his visit to Edinburgh.

There is much in the present tract that has interest for modern lawyers; but there is also much that is antiquated. Like most eighteenth century philosophers, Lord Kames was a profound believer in the original savagery of mankind, and held that all knowledge grew out of absolute ignorance, forgetful of the adage, *ex nihilo nihil fit*. He, therefore, deemed it necessary to expound the causes which conduced to the recognition of the binding force of promises and covenants, at a period when every man was an Ishmael, his hand uplifted against his neighbour.

Fortunately, we need not follow his lordship into this quagmire. There is as yet no evidence which satisfactorily establishes the first step in the chain of argument, that in the beginning all men were ignorant savages and lived in a "state of nature." It is therefore possible to argue quite as cogently that the savages known to us are human beings who have degenerated from a superior type, as that they are specimens of the type from which intelligent man has developed. Be this as it may, it is unnecessary to discuss the question here, because the making of promises and covenants depends less upon the degree of civilisation, than upon the degree of *self-sufficiency*, prevalent among human beings.

So long as a man can supply his own wants without applying to his fellows he enters into no covenants. So soon, however, as he seeks the co-operation of others, a promise or covenant is necessary, whether he be savage or civilised, and whenever promises and covenants are necessary to the comfort or well-being of men, they must be made solemn and binding. The question of original savagery is therefore irrelevant to the point at issue.

It is perfectly clear that in ancient times all promises were not held to be equally binding upon the maker. From this we may draw the inference that the solemnities then attached to certain pactions were not arbitrarily devised. We are told that Louis XI of France had particular forms of oath which he considered binding, and that he was apt to ignore obligations undertaken upon any less solemn asseveration. In a similar manner, these old peoples deemed some promises more binding than others, and impressive ceremonies and solemnities thus served a distinct purpose. They were meant to indicate that the parties regarded the covenant upon which they were entering as of sufficient importance to justify its compulsory enforcement, in the event of either of them failing to implement it. Covenants which were not marked by impressive ceremonies were esteemed with the same lightness as the *nuda pacta* of the Romans.

The ceremonies and forms of words by means of which Greeks and Romans indicated the solemnity and binding nature of their covenants, are matters of common knowledge, but Herodotus has preserved several less familiar practices of ruder nations.

It appears that Scythians, when they entered into a compact, took a vessel of wine and tinged it with blood drawn from each of the contracting parties. In the wine so stained they dipped a scymitar, some arrows, a battle axe, and a javelin. The contractors then swore to observe

their contract. and drank of the wine along with the witnesses.\*

The Medes and Lydians followed customs similar to those of the Greeks, but made an addition, which is revolting to our ideas. Each party to the covenant wounded himself in the arm, and the other sucked a portion of the blood.<sup>2</sup>

This practice of drawing blood, which forms a usual incident in folk-lore and tales of *diablerie*, seem to have been a general formality among half-civilized peoples. The Arabs laid much stress upon it. In their covenants, a third person stood between the contracting parties and made an incision with a sharp stone in the palm of one hand of each. He then took a piece from the garment of each and dipped it in the blood. With this he anointed seven stones, at the same time invoking the gods, and exhorting the parties to be faithful in implementing their compact.<sup>3</sup>

Some African tribes dispensed with blood. The parties mutually presented a cup of liquor, in which they pledged themselves to fidelity. If no liquor could be procured, each lifted a handful of sand and put it into his mouth.

The Hebrew Scriptures provide us with several examples of the same idea. It will suffice to mention two. In the 21st chapter of Genesis we are told that Abraham, when he made a covenant with Abimelech, set seven ewe lambs of the flock by themselves. Abimelech asked, probably as part of the ceremony, "What mean these seven ewe lambs which thou hast set by themselves." Abraham replied, "These seven ewe lambs shalt thou take of my hand, that they may be a witness unto me, that I have digged this well."

The second instance is more peculiar. It occurs in the 34th chapter of Jeremiah. A solemn covenant had been made with Jehovah, on which occasion a calf was cut in two, and the rulers, priests, and people passed between the

\* Herodotus, IV, 70.

<sup>2</sup> *Ibid.*, I, 74.

<sup>3</sup> *Ibid.*, III, 8.

two parts of the calf. A divided animal seems to have been a symbol of special solemnity, as it is mentioned more than once in the Scriptures.

We may therefore conclude that these peculiar rites or solemnities were devised to emphasise particular promises and covenants, to the end that the parties might not evade fulfilment by pleading that they did not regard their promise or mutual agreement as binding upon them. Where the appropriate ceremonial had not been used, implement was a voluntary act, and a man was not liable to be compelled to make good an undertaking so loosely given.

To this, however, there was an important exception. A promise of *liberation* from an obligation was binding even without solemnities. Probably, this arose from the consideration that there is a wide difference between refusing to enforce an obligation, even where it is just, and enforcing an unjust claim. That is to say, less harm results when a judge refuses to act, than when he actively aids injustice. Both are unjust judges, but the latter is the more harmful. Consequently, it was natural that more care should be taken to see that no man was compelled to implement an obligation from which he had been released, than that a man should be compelled to implement an obligation which he was unwilling to recognise.

In course of time a solemnity of a more simple, yet more effectual, character, was introduced. The parties, in place of distinguishing their compact with curious ceremonial, calculated to inspire awe or dread, appeared before a judge and declared in his presence the agreement they had made. This being recorded by the judge was preserved intact, and was not only shown to be the wish of the parties, but also made readily available for enforcement. Traces of this practice remain. Recognizances and Bonds of Judgment in England, and in Scotland consents to registration in



the books of a court for execution, are reflections of this old custom.

A promise or covenant having been constituted with the requisite formality, and one of the parties having failed to implement it, the next step is to consider in what way the terms of the compact are established by proof.

Writing is the most satisfactory evidence, but if we seek to discover the stage of human history at which written evidence became available, we are confronted with another phase of the "state of nature" controversy. Archæologists are not agreed as to the date of the original invention of writing. It was at one time a generally received opinion that writing was a comparatively modern invention. *A priori* there does not appear to be any imperative necessity for holding that the use of writing was much later than the use of speech. The question depends upon the condition of original man, and of that we have no perfect knowledge. We do not know whether man was, at the outset, a speaking or a speechless animal, or how long it was before he was able to express his ideas in written characters or signs. Recent researches tend to carry the art of writing to a more remote date. We have been successively told to look for its invention to various Eastern nations, but it is now a question whether we ought not rather to look to the ancient civilisations of South America. It is yet too early to think of placing the origin of civilisation on the slopes of the Andes, but the fact that learned men are contemplating such a possibility should at least make us chary of committing ourselves to theories which are based upon a mere hypothesis.

Setting aside, therefore, any attempt to dogmatise on such a subject, it may be said that the ascertainment of the true nature of a promise or covenant is often one of the most difficult tasks which can be attempted by a court of law. Suppose we are called upon to interpret judicially the terms of a contract between A and B, to which X, Y and Z

are witnesses. Arranging the points after the method of Dr. Wendell Holmes, we have—

- (1) The contract as A understood it ;
- (2) The contract as B understood it ;
- (3) The contract as X, Y, and Z understood it ;
- (4) The contract as A, B, X, Y, and Z try to explain it in their evidence ; and
- (5) The contract as the judge understands it, upon his construction of the statements of the witnesses.

It is obvious that there will frequently be a wide divergence between (1), (2), and (5), and yet it is upon such imperfect premises that justice has sometimes to be administered.

The two kinds of evidence to which most weight is given are, writing, and the judicial confession of the opposite party. A third kind, which to some extent combines the two, is an adaptation of the declaration in presence of a magistrate, to which allusion has already been made. A Recognizance before a court of law furnishes a distinct indication of the relations subsisting between the parties. A Bond in Judgment, which is an extension of the Recognizance, is equally effectual for that purpose. In Scotland, it is the practice in framing written contracts to insert a clause at the end, declaring that the parties consent to the registration of the deed in the books of a competent court for preservation and execution. This is equivalent to a consent to a decree of the Court being pronounced against the person who fails to implement the contract, and entitles the person who has suffered by such failure to obtain an extract upon which execution may follow for the enforcement of the terms of the agreement. These several methods of procedure recognise the advantage of making the Court, as it were, from the outset a witness to the covenant,

Most nations, being impressed with the difficulty of arriving at the truth by ordinary measures, have at one time or another made use of artificial methods. I do not allude to torture, because that was in especial a criminal or political weapon, but to ordeals by fire and water, and trial by combat.

The ordeals took various forms. The party denying his promise might be required to carry a red-hot iron bar for a certain distance, after which his hands were wrapped up. If, on the lapse of a specified time, the burns had left no marks, he was declared clear. Or he might be asked to swim across a river swarming with crocodiles of a man-eating variety, being absolved if he reached the other side. It may be imagined that unless the question at issue were literally one of life or death, most defendants in those days preferred to let judgment go by default.

A more popular mode of trial was the wager of battle, which was admirably suited to a people full of the lust of fighting. The examples in *Ivanhoe* and *The Fair Maid of Perth* have made the procedure on such occasions familiar to most, but the expedient which was adopted to get rid of the necessity of fighting, when the defendant was a man "of milder mien," is not so well known.

This was the Oath of Compurgation. In its most perfect form the defendant appeared and swore that he had not made the promise or covenant alleged by his opponent. He supported his assertion by the oaths of twelve compurgators, who deposed that the defendant's declaration was true. It is probable that the compurgators had not in every case personal knowledge of the facts, but merely vouched for the integrity and credibility of the defendant. There seems to be no doubt that this odd process was introduced as an escape from the more terrible wager of battle. In the quaint old body of law called "*Quoniam Attachamenta*," it is laid down that a man accused of crime

shall have it in his choice whether he will defend himself by battle, or by "the cleansing of twelve leal men."

Judicial purgation would have little interest for us to-day, were it not for the light it throws on the origin of trial by jury. At first, as we have seen, the twelve leal men were chosen by the defendant as compurgators to support his oath. It was a simple transition that they should be chosen by the judge as witnesses to do justice between the parties. The jury became, in fact, a body of witnesses called by the judge to declare the truth.

If this be true, it imparts a new meaning to several problems well known to lawyers. It explains, in the first place, why the verdict of a jury is final on the facts. Trial by combat was from its nature final; the oath of purgation, which came in its place, was also final, and therefore the verdict of a jury, which takes the place of both, is of necessity final.

It also suggests a reason for the rule that a jury of twelve must be unanimous. It was required that the compurgators should be unanimous in their depositions, and so the verdict has to be arrived at in the same way.

Then it gives a clearer meaning to the oath administered to Scottish criminal jurors,—“you will truth say, and no truth conceal, in so far as you are to pass on this assize.” As the modern criminal verdict in Scotland contains no specific findings as to the facts of the case, the terms of the oath are rather meaningless, apart from the suggestion that the jury (although raised in number to fifteen) represent the twelve compurgators, who had to declare the truth of the matter at issue.

It is a melancholy thought that, in spite of the expedients which human ingenuity has devised, human depravity is still able to thrive upon falsehood and fraud. It is not uncommon for a client to declare to his lawyer that he must succeed, “because he has the truth on his side.” He might

indeed speak with such confident hope, if he could say, as was once boasted—"I have gained my case, it has been referred to my oath," but not when his case has to be established by ordinary evidence. Truth is said to be at the bottom of a well, and it is often a difficult operation to bring her undefiled to the surface. The process generally stirs up a quantity of mud, and occasionally a mass of poisonous matter. There is the same inequality in modern litigation that there was in the ancient wager of battle. The man who was in the right was not always the better swordsman; now he is not always the better disputant.

And so we come back to the proposition with which we set out. Promises are by nature fragile, and the repair of their breach, so far as that is possible, is one of the chief functions of courts of law. From the date at which men ceased to be self-sufficing till the present day, humanity has been striving to mend broken promises and covenants. These efforts have taken two directions. They have led to the invention of numerous and varied safeguards to ensure that the parties enter into their compact deliberately and with a full sense of the importance of what they are undertaking; and they have led to the adoption of special means for the ascertainment of truth.

All human devices are fallible, and so we must not be disappointed because in every case the truth is not brought to light. Yet we may console ourselves by the reflection that at the present day litigants can have confidence that there is a greater probability of that object being attained than at any previous epoch in the history of the world.

There is, in what I have here recalled from the obscurity of Ancient law, a lesson which may repay the trouble of our excursion. We have learned that in making promises and covenants, it is *at the outset* that care should be taken. If at the time of making a promise or entering into a covenant everyone took pains to understand fully what he himself

wished and intended, what the other party wished and intended, and what were the conditions of their agreement, and to see that these were properly recorded, the labours of lawyers and judges would be immensely facilitated. That was the aim of ancient wisdom, and we would do well to make it our own.

HENRY H. BROWN.

### III.—CONSPIRACY IN CIVIL ACTIONS.

THE question of the effect of pre-concert and combination in Civil law is beset with difficulty and obscurity, arising partly from the ambiguity of judges' words when touching on the subject. One point is clear—that mere conspiracy, though often indictable, is never actionable, unless some act, which produces damage, has been done in pursuance of it. Whether that act must be one in itself unlawful, or whether, through the mere fact of having been done in pursuance of conspiracy, it may become so, is a point on which the statements of opinion differ. Whether a conspiracy to harm another person, to do some act which is intended to inflict loss upon him and does inflict it, may not give a cause of action, though the same act done with the same intention by an individual would not constitute a wrong and would not be actionable, is not altogether clear. In considering *both* these questions it is well to bear in mind the fact that in individual action object merely constitutes motive, while in the action of many acting on agreement, it takes an ulterior, substantive form through becoming the subject of an agreement. But whether the Civil law takes any notice of that agreement except in so far as pre-concert and combination may intensify effect, whether it regards it as an unlawful act, though, admittedly, not actionable unless some act pro-

ducing damage springs from it, is, at least, very doubtful. These are the questions whose position is sought to be here dealt with.

The case of *Quinn v. Leathem*<sup>1</sup> decided in fact that malicious interference with another's trade or labour proceeding from pre-concert and combination is unlawful, but it did not decide that it was the presence of pre-concert and combination that rendered it unlawful, because in order to do this the Lords should have held (1) as a fact, that there was nothing unlawful—conspiracy apart—in the acts by which the defendants effected their interference; and (2), as law, that malicious interference with another's trade or labour—again conspiracy apart—unless by acts in themselves unlawful, is not unlawful, as seemed to have been laid down by *Allen v. Flood*.<sup>2</sup>

When *Quinn v. Leathem* (the title of the case was *Leathem v. Craig*<sup>3</sup> till it was brought to the House of Lords) was tried, *Allen v. Flood* was as yet an authority for the doctrine that malicious interference with another's trade or labour, though by acts not unlawful in themselves, was unlawful. The first and second questions which Fitzgibbon, L.J., left to the jury were—(1) Did the defendants or any of them wrongfully and maliciously induce the customers or servants of the plaintiff named in the evidence to refuse to deal with the plaintiff? (2) Did the defendants or any two or more of them maliciously conspire to induce the plaintiff's customers or servants named in the evidence or any of them not to deal with the plaintiff or not to continue in his employment, and were such persons so induced not to do so? To both questions the jury answered—Yes—and, upon the second finding, the judgment for the plaintiff was upheld, successively, by the Queen's Bench and the Court of Appeal, in Ireland. When the case came before the Irish Queen's Bench the decision

<sup>1</sup> L. R. [1901], A.C. 495. <sup>2</sup> L. R. [1898], A.C., p. 1. <sup>3</sup> 2 I. R. [1899], 667.

of the House of Lords in *Allen v. Flood* had been given. Throughout all the judgments of the members of the Court rings a tone of lament over that decision. Indeed, the judgment of the late Mr. Justice O'Brien is largely devoted openly to deploring it and to arguments adduced to show that it was wrong. With respectful resentment, they say that they are bound to hold that the acts of the defendants, had they been the work of an individual only, would not have been actionable, but they say—and here their judgment is especially noteworthy—that the decision in *Allen v. Flood* has not done away with the inherent wrongfulness of the acts done by the defendants in their case or by Allen in his, and that it has only declared them not to be actionable when done by an individual—and that, being wrongful, being done maliciously in order to injure another, they are, by the Common law, actionable when done in pursuance of a conspiracy. Will the premiss of their argument stand scrutiny? The House of Lords said that Allen's action was not unlawful. What force has the adjective "wrongful," used by the Irish judges, if the word "unlawful" cannot be substituted for it? If it means that, though inherently unlawful, such acts are, for certain reasons, in some cases, declared not to be actionable, the decision of the Lords in *Allen v. Flood* distinctly negatives such a theory, which resembles rather that favoured by the minority of the House.

From this judgment Palles, C.B., dissented. In doing so he would seem to have been consistent with his own judgment given eight years previously in *Kearney v. Lloyd* (26 L. R. Ir., 268), which he had expressly based on the ground that an act, not in itself unlawful, did not become so because done in pursuance of pre-concert, unless such pre-concert constituted a criminal conspiracy, and in *Quinn v. Leathem* he conceived (but the Lords held otherwise) that the criminality was obviated by the Conspiracy and Protection of Property Act 1875, s. 3.



In *Kearney v. Lloyd*, Palles, C.B., held that a conspiracy to harm—apart, of course, from any unlawfulness of the contemplated means—did not give a cause of action, unless the harm intended were a legal injury. Counsel had urged upon him that such a conspiracy was a criminal offence, but he held that to render it criminal—again, of course, the contemplation of unlawful means excepted—its object must be shown to have been one in itself unlawful.

As the main authority for his decision in *Kearney v. Lloyd*, the Lord Chief Baron had quoted the statements of Lord Holt, in *Savile v. Roberts* (1 Raym. (Ld.), 374). The action there was against an individual for malicious prosecution on a charge of misdemeanour, and, the statutes and the ancient writ of conspiracy dealing only with malicious prosecution when carried out in furtherance of a conspiracy, it was argued that, there being no conspiracy in that case, no action lay. Lord Holt replied, "Conspiracy is not the ground of these actions but the damages done to the party: for an action will not lie for the greatest conspiracy imaginable if nothing be put in execution, but if the party be damaged the action will lie. From whence it follows that the damage is the ground of the action, which is as great in the present case as if there had been a conspiracy. And F.N.B. 114 D. says that where two cause a man to be indicted, if it be false and malicious, he shall have conspiracy: where one he shall have case: so that the actions are founded upon one common foundation, but the number of the parties defendants determines it to the one or to the other."

Here conspiracy is spoken of in the narrower sense to which for a long time it remained restricted, that is, roughly, a combination falsely to accuse. As such, if the offence charged was a felony, the conspiracy itself was a Common law misdemeanour, and, for that purpose, the actual conspiracy was the gist of the offence. It is quite clear that no action will lie for conspiracy if nothing be put in execution.

For the purposes of a civil action the damage suffered in consequence of the conspiracy is the thing for which the action may be brought. It is unnecessary to refer to the fact that there are classes of wrongs of whose actionability damage is an essential part. It does not seem, then, that one must necessarily deduce from Lord Holt's statement the conclusion that an act causing damage may not be actionable as being a legal wrong when done in pursuance of conspiracy, which, when not so done, may not be actionable as not amounting to a legal wrong. Moreover, even if such a conclusion should seem necessarily deducible, one must bear in mind that all that Lord Holt had to decide was whether an action can be maintained for a malicious prosecution for a misdemeanour, though conspiracy be not alleged: so that a statement, if there be any, to the effect that conspiracy as such will never render actionable conduct not otherwise so would partake of the nature of *obiter dicta*.

The judgment of the Court of Queen's Bench in *Quinn v. Leatham* was upheld by the Irish Court of Appeal on the same grounds as those given by the former Court, and, finally, it was unanimously upheld in the House of Lords. The *ratio decidendi* of the judgments of their Lordships is not easy precisely to distinguish, but the most general ground seems to be that a combination with the objective of injuring a person in his trade or labour is unlawful. The use of the word "injure" occasions some obscurity, because it is not easy to determine whether it is used in its strictly legal sense, that is, to denote the infringement of a legal right or whether it includes mere harming.

In his judgment, dealing with the defendant's conspiracy, Lord Macnaghten asks (pp. 510, 511), "Does a conspiracy to injure resulting in damage give rise to civil liability?" His Lordship thinks that "there is authority for that proposition and that it is founded in good sense." One of the authorities which he quotes, is the charge of the late Lord

Fitzgerald to the jury in the *Parnell Case*.<sup>1</sup> But that charge expressly states that the injury which, as object of a combination, will constitute the latter a criminal conspiracy, is one which, when executed by an individual, without preconcert, is a "wrong," "an injury carrying with it a right to civil remedy." That Lord Macnaghten regarded the object of the defendants' combination as being in itself legally wrongful is, further, rendered probable by the comparison which he makes in his judgment between a "conspiracy to injure" and "an invasion of civil rights by a single individual." In an earlier passage, quoting with approval a statement made by Lord Watson in *Allen v. Flood*, he says (p. 510), "Obviously Lord Watson was convinced in his own mind that a conspiracy to *injure* might give rise to civil liability, even though the end were brought about by conduct and acts which, by themselves and apart from the element of combination or concerted action, could not be regarded as a legal wrong." The most probable interpretation of Lord Macnaghten's comment would seem to be that a combination whose object is a legal wrong—not merely harm—may be actionable though the wrong be effected by means not in themselves unlawful. On this interpretation, it is similar to an opinion expressed by Lord Brampton which is quoted below.

Lord Shand says that the question to be tried is whether, in consequence of the decision in *Allen v. Flood*, and of the grounds of that decision, it is now the law that where the acts complained of are in pursuance of a conspiracy to injure or ruin another, and not to advance the parties' own interests, and injury has resulted, no action will lie. He quotes (p. 513) in answer a statement by Bowen, L.J., in the *Mogul Case*,<sup>2</sup> that "intimidation, obstruction, and molestation are forbidden: so is the intentional procurement of a

<sup>1</sup> [1881], 14 Cox C. C. 508.

<sup>2</sup> 23 Q. B. D. 598.

violation of individual rights, contractual or other, assuming always that there is no just cause for it."

Lord Shand says that the defendants were guilty of unlawful acts, unless the judgment in *Allen v. Flood* has introduced a change which has rendered such acts lawful. He then proceeds to interpret that judgment as being based on the "vital distinction," that Allen's acts were simply for the purpose of promoting his trade interest and not for the purpose of injuring—an interpretation which seems to the student to undo one-half of that important decision. Thus, his judgment seems to rest more on the basis that the defendants' acts constituted a wilful—and wrongful—interference with the trade and labour of others, having been carried out for the purpose of inflicting loss, rather than on the fact that in their case there was conspiracy while in Allen's there was none.

Lord Brampton, intending to distinguish the case from *Allen v. Flood*, says (p. 525) "the real and substantial cause of action is an unlawful conspiracy to molest the plaintiff, a trader, in carrying on his business, and by so doing to invade his undoubted right." Thus, as an authority which he quotes, clearly states, an invasion of an undoubted right being a legal wrong, Lord Brampton appears to regard the object of the combination to have been one in itself unlawful. "A conspiracy," he says (p. 528), "consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person."

"It has often been debated," he says lower down (p. 529), "whether assuming the existence of a conspiracy to do a wrongful and harmful act towards another and to carry it out by a number of overt acts, no one of which taken singly and alone, would, if done by one individual acting alone and apart from any conspiracy, constitute a cause of action, such

acts would become unlawful or actionable if done by the conspirators acting jointly or severally in pursuance of their conspiracy, and if, by these acts, substantial damage was caused to the person against whom the conspiracy was directed: my own opinion is that they would.

"In dealing with the question, it must be borne in mind that a conspiracy to do harm to another is, from the moment of its formation, unlawful and criminal, though not actionable unless damage is the result."

By the word "harm," in this passage, Lord Brampton appears to mean "injury." The context and the opinion which he expresses on the decision of Darling, J., in *Hutiley v. Simmons*,<sup>1</sup> seem to show this. "The overt acts," he continues (p. 530), "which follow a conspiracy form of themselves no part of the conspiracy: they are only things done to carry out the illicit agreement already formed."

"It is the wilful doing of that mischief," he says, "coupled with the resulting damage, which constitutes the cause of action, not of necessity the means by which it was accomplished."

According to this opinion, it would seem that the fact itself of conspiracy may supply a cause of action where otherwise it would not exist. The following would appear to be a fair illustration of it. One person contracts to sell land to another; a third person, anxious to secure the land, tells the vendor that the vendee intends to build a music hall on it: the third person has privately learned that such is, in fact, the vendee's intention, and, knowing the vendor to be much prejudiced against theatres, his object in informing him is, that he may refuse to complete his contract with the vendee, and the vendor has, in consequence, so refused. It seems to be fairly clear that the vendee will have no cause of action against that other man. He related a true fact, his act was not unlawful, his object was the

<sup>1</sup> L. R. [1898], 1 Q. B. 181.

motive that prompted his act, and, though bad, cannot make his lawful act unlawful. But if several people, anxious to secure the site, having likewise privately acquired this information of the vendee's intention, agree, with the object of procuring a refusal on the vendor's part to complete his contract to sell, that one of their number shall go and impart the information to him, they might, according to Lord Brampton's statements, be liable to an action, because they agreed upon an unlawful object—a procurement of a violation by the vendor of the vendee's right under his contract with him—and it does not matter that the act by which they agreed to bring about the breach and have brought it about was not one in itself unlawful.

It may be pardonable again to draw attention to the fact that the word "object" is used in two different senses in the latter of these two supposed cases, while in the former it is only synonymous with motive. The object of the several people, in the latter case, in entering into the agreement makes no difference, as it is only motive, but the object upon which they agree is the subject of this agreement, and is very material. The agreement is a substantive act, and, according to Lord Brampton, an unlawful act, its object being unlawful. Such a result— if the illustration is a correct interpretation of Lord Brampton's opinion—receives support from the following words spoken by Lord Bramwell in the *Mogul Case*.<sup>1</sup> Referring to the plaintiffs' contention, in that case, that the defendants' acts, even if done only by an individual, would be actionable, he says: "This need not be determined directly, because all the things complained of have their origin in what the plaintiffs say is unlawfulness, a conspiracy to injure." (It seems almost absolutely clear that on the true construction of this sentence the words "the plaintiffs say," relate to the fact of the origin, not to its quality of unlaw-

. <sup>1</sup> L. R. [1892], A. C., pp. 44, 45.

fulness, which is, apparently, declared by Lord Bramwell himself). Moreover, it accords with the reasoning of Palles, C.B., in *Kearney v. Lloyd*, where one of the grounds of his decision was, that the object of the conspiracy, though, assumedly, intentionally harmful, was not legally injurious. But the Lord Chief Baron regarded this distinction as important only in dealing with the argument that the conspiracy was indictable, because, apart from its criminality, he appears to have considered that conspiracy could not supply a cause of action. "The cause of action must exist," he said, "although the allegation of conspiracy be struck out."

*Quinn v. Leathem* affords authority for the proposition that a combination maliciously to injure another in his trade (the word "injure" being used strictly, *i.e.*, in its legal sense), resulting in acts causing damage, is actionable, even though these acts be not unlawful if done by an individual apart from conspiracy. That it is an authority for the proposition that a conspiracy to harm resulting in acts, which inflict pecuniary damage but are not in themselves unlawful, gives a cause of action, is, at least, very doubtful. In other words, it contains statements indicating that a conspiracy to commit "*injuriæ*," resulting in the infliction of "*damnum*," is actionable. But for the proposition that "*damnum*" which, for its own sake, has been the object and is the result of, a conspiracy, becomes by reason of the conspiracy "*injuria*" as well, it is, at least, no clear authority. In addition to the fact that consideration was given by the Lords to their opinion that there had been coercion, and—to quote from Lord Halsbury's judgment (p. 507), "threats and threats carried into execution"—though, as Holmes, L.J., and Porter, M.R., in *Ireland*, had pointed out, there had been no finding by the jury as to such allegations, there is another and deeper cause which prevents the decision from being a clear authority

for the second proposition. That cause is the almost universal expression of opinion that the object of the conspiracy—a spiteful interference with the trade and labour of others—was in itself wrongful.

Indeed, in the Irish Queen's Bench, Andrews, J., declared that not even the House of Lords could “change the inherent nature of such conduct (that of the appellants in *Allen v. Flood*), or make it otherwise than wrongful in the sense of being an invasion of another's right”—and more than one member of the Irish Courts expressed an opinion that the decision in *Allen v. Flood* had altered the law of the land.

Throughout all the stages of *Quinn v. Leathem* the judgments abound in declarations of the “injury” which was the object of the combination, of the “wrongful interference with rights.” There is not a whole-hearted acceptance of *Allen v. Flood*. On the part of the Irish judges there was a disinclination to promote a decision to which they were unable to give an intellectual or moral assent. On the part of the Lords there was a shrinking from a decision of their own House.

Similar to *Quinn v. Leathem* is the case of *Giblan v. National Amalgamated Labourers' Union*.<sup>1</sup> The judgment in it does not seem to afford any more authority for the proposition that a conspiracy to “harm” resulting in the infliction, by means not in themselves unlawful, of pecuniary loss, is actionable, than does the judgment in the former case, on which it was based, and the observations as to which, if well founded, will also apply to this case.

Mr. Justice Walton does not seem to have especially demarcated the point of conspiracy in his questions to the jury, the first and second of which ran thus—(1) “Did the defendants, Williams and Toomey, acting together or individually call out the union men, or threaten to call them

<sup>1</sup> L. R. [1903], 2 K. B. 600.



out, unless the plaintiff was stopped? If they or either of them did, did they or he by so doing prevent or endeavour to prevent the plaintiff from getting employment or retaining his employment?"

In the Court of Appeal it was, undoubtedly, held that a conspiracy maliciously to interfere with the plaintiff in obtaining or retaining employment was a ground for recovery of damages—but such interference was regarded as unlawful apart from conspiracy by both Vaughan Williams and Romer, L.JJ. The former does not mention conspiracy in his statement of the law, according to the report of his judgment. "He" (the defendant Toomey), his Lordship says (p. 617), "undoubtedly did an actionable wrong to Giblan in interfering with his right to dispose of his own labour." Lord Justice Romer desired to make it known that he thought that the plaintiff might succeed even without establishing conspiracy, on the ground that, if a person, who, by virtue of his position or influence, has power to carry out his design, spitefully prevents another from obtaining employment by special influence on his employers, he is liable in an action. "And I think this view," his Lordship added (p. 620), "is borne out by the views expressed by the members of the House of Lords who decided the case of *Quinn v. Leatham*." These last words appear to afford some sanction to the observations made above as to the nature of that last-named decision. Stirling, L.J., appears to have based his decision on the ground of conspiracy, the means being, he held, at least through their having been exercised by a combination, unlawful—though he expressed himself far from satisfied that they would not have been illegal even if done only by an individual.

The case most frequently cited as an authority for the actionability of a conspiracy aimed against an individual is *Gregory v. Duke of Brunswick*.<sup>1</sup> There were two arguments

<sup>1</sup> 6 Scott's New Reports, 809.

in the case, the first being as to the admissibility of a plea put in by the defendants in answer to a charge of conspiracy to hiss and hoot an actor off the stage. The plea had set out matter calculated to justify the hissing, but making no answer as to the conspiracy. The Court of Common Pleas held that the plea was bad as not answering the essential charge, Maule, J., observing that the defendants should justify the conspiracy or show that there was none or nothing done in pursuance of it. "The hooting, &c.," he said (p. 816), "would not *per se* afford a ground of action." But whether by these words he meant to include hooting maliciously planned beforehand by an individual for the purpose of preventing an actor from following his profession seems very doubtful. It seems highly probable that the importance attached by the Court to the allegation of conspiracy is due largely to the emphasising of planned action to interrupt the player, as distinguished from spontaneous expression of feeling. In giving the judgment of the Court on the demurrer, according to the version in Scott's New Reports (p. 822), Tindall, C.J., said, "It appears to me that the fourth plea, which professes to be pleaded in confession and avoidance of part of the cause of action, viz., the hooting, &c., does not, in fact, confess and avoid any part of that which is the gist of the action. The charge against the defendants is that they conspired together with others for a certain unlawful purpose."

On motion for a new trial<sup>1</sup> the plaintiffs' counsel contended that the action, though commonly called a conspiracy, was really one of tort, and would lie, though only one party was guilty; but Tindall, C.J., answered him (p. 957) that the case had not been so presented: that the plaintiff had undertaken to prove that the defendants had conspired with an organised band to drive him off the stage. In giving the judgment of the Court, Coltman, J., said that

<sup>1</sup> 6 Man. & G. 593.

it might be true that, on the declaration, as framed, one defendant only might have been convicted, but that it was questionable whether the plaintiff would have entitled himself to a verdict against one alone, because hissing in a public theatre is *prima facie* a lawful act, and even if it should be conceded that, though done without concert with others, it might furnish a ground of action, it would be very difficult to infer such a motive from the insulated acts of one person.

Thus, *Gregory v. Duke of Brunswick* does not appear to be an authority for the proposition that a conspiracy to do a harm as distinguished from an injury to another gives a cause of action; nor does it seem to be quite a definite authority for the proposition that the fact of conspiracy may supply a cause of action where otherwise it would not exist. If it is such an authority, it is a little remarkable that in *Cotterell v. Jones*<sup>1</sup> the Court of Common Pleas should have displayed so much doubt as to the soundness of the latter proposition, and that Maule, J. (p. 723), who had been a member of the Court that decided *Gregory v. Duke of Brunswick*, should, during the hearing of *Cotterell v. Jones*, have asked the Plaintiff's counsel "Is there an instance of an action against two or more for a conspiracy to do and doing a thing which would not be actionable if done by one?" Counsel replied "*Gregory v. Duke of Brunswick* is very like that case." Maule, J. followed up his question by asking "Would an action lie against two or more for conspiring or agreeing not to bid at an auction?" Counsel having submitted that an action would lie, Maule, J. replied, "It is often done but I never heard of an action being brought."<sup>2</sup>

The allegation in *Cotterell v. Jones* was one of maliciously conspiring without reasonable or probable cause to institute

<sup>1</sup> 11 C. B. 713.

<sup>2</sup> In *Levi v. Levi* (6 C. & P. 239) Gurney, B. expressed an unhesitating opinion that such a combination would be an indictable conspiracy.

an action against the plaintiff in the name of a third person, but merely for the defendant's own benefit, whereby the plaintiff sustained damage. A rule in arrest of judgment was made absolute after a prolonged argument by the plaintiff's counsel, the Court deciding against him—on a technical ground—on the question of the proof of damage, and, so, declaring it unnecessary to express an opinion on the larger question, as to whether such a conspiracy as was alleged would constitute a cause of action.

In *Salaman v. Warner*,<sup>1</sup> Day, J., dealing in his judgment with the plaintiff's argument that he was entitled to recover on the ground of conspiracy, said "I, at once, speaking for myself, disavow the term 'conspiracy' as having any legal efficacy on the civil side of our Courts. The term 'conspiracy' is a well understood term on the Crown side; but there is no remedy that I am aware of obtainable on the civil side in respect of conspirators other than that which you can obtain against each individual member of the conspiracy.' He proceeded to say that it must be shown that the defendants had infringed some legal right of the plaintiffs "whether in combination or not in combination is utterly immaterial." Lawrance, J., who sat with him in the Divisional Court, concurred in his judgment. In dismissing the plaintiff's appeal,<sup>2</sup> Lord Esher said in his judgment, "When can an action be maintained against defendants who have entered into a conspiracy? Only if they have entered into a conspiracy against the right of the plaintiff and they have effected their purpose—that is a breach of the rights of the plaintiff." This statement, it is submitted, affords support to the proposition that, a conspiracy to commit a legal injury may be actionable, even if the injury be effected by acts not wrongful in themselves. Fry, L.J., reserved his opinion as to whether "an action will lie for injury resulting to the plaintiff for an act done

<sup>1</sup> 64 L. T., N. S., 598.

<sup>2</sup> 65 L. T., N. S., 132.

by several persons, assuming that that act would have been lawful if done by one, but is unlawful if done by several as the result of a combination between them." Lopes, L.J., said, "Now it is clear that an action for conspiracy is not known to the law," adding that it is not the agreement to do an act which results in the infringement of legal rights, but the infringement itself which gives a cause of action.

But in *Temperton v. Russell*,<sup>1</sup> Lopes, L.J., held that a conspiracy maliciously to prevent others from entering into contracts with the plaintiff was actionable. He considered that *Gregory v. Duke of Brunswick* and the *dicta* in the *Mogul Case* were authorities for so holding, as was also stated by Lord Esher in his judgment. But, above the ground of conspiracy, Lord Esher held that the presence of the malicious motive made the inducing not to make equally actionable with the inducing to break, contracts. A. L. Smith, L.J., considered that in accordance with what was said in *Bowen v. Hall*<sup>2</sup> and in the *Mogul Case* the conspiracy was actionable. The reference to *Bowen v. Hall* would seem to be one to the opinion expressed there by Lord Esher as to the effect of malicious motive in the procurement of a breach of contract—which opinion the Lords, in *Allen v. Flood*, held not to be law. Thus, bearing in mind that *Temperton v. Russell* was decided in 1893, it may well be a matter of conjecture whether the malicious inducement not to make contracts would not have been held to be actionable apart from conspiracy, and whether the latter element was considered to be an essential part of the cause of action.

Probably some such view of the case of *Temperton v. Russell* was entertained by Bigham, J., when he gave judgment in *Boots v. Grundy*,<sup>3</sup> for he there, unhesitatingly, held that a combination to harm another in his trade, even from the sole motive of harming, and resulting in such

<sup>1</sup> L. R. [1893], 1 Q. B. 715.

<sup>2</sup> 6 Q. B. 11, 333.

<sup>3</sup> 82 L. T. 769.

harm, is not actionable unless a legal right shall have been violated. Phillimore, J., dissenting, considered that such a combination, its object being purely malicious, was indictable and therefore actionable. He thought that there were cases, *R. v. Warburton*,<sup>1</sup> for instance, which went to show that conspiracies whose object was not even the commission of a tort, are indictable—and he based his judgment, moreover, on the observations of Lords Bramwell, Hannen and Field in the *Mogul Case*, and the reservations as to conspiracy made by Lords Herschell and Macnaghten in *Allen v. Flood*. In the case of *R. v. Warburton*, referred to by Phillimore, J., a conspiracy on the part of a partner and another to defraud the former's co-partner was held to be an indictable offence, though the fraud did not constitute an actionable injury at law; but it was so held on the ground that it was a wrong for which a remedy lay in equity.

This judgment of Phillimore, J., is worthy of careful consideration as it touches upon the root of the whole question, and one can scarcely help feeling a desire for a definite decision of the final tribunal on the subject. Suppose that three corn dealers have, individually, made a contract with a speculator in corn to sell a cargo to him on its arrival, provided they do not sell it prior to that event. Before the cargo arrives they, merely with the spiteful object of causing the speculator to suffer heavily, agree that each one shall sell his cargo before arrival though it fetches a slightly lower price than that stipulated by the speculator, which agreement being carried out, the latter suffers a heavy loss. Has he a right of action against the dealers? It seems clear that if it had been the case of such a conditional contract with a single dealer only, who had subsequently, from the same motive, sold as above, the speculator would have had no cause of action. The

<sup>1</sup> L. R. [1870], 1 C. C. R. 274.

comparison of the two cases introduces us to the main ground for distinguishing theoretically between the same external act when done in pursuance of a conspiracy and when done apart from it. The action of the single dealer lets itself, it is submitted, be divided into two, and no more than two, essential parts; one being the resolve or intention to harm, the other being the act of selling. The latter is a lawful act which he is quite entitled to do. Thus, it is clear that the two parts taken separately are outside the interference of the law. Therefore, it is again submitted, it must follow that, if taken together the law punishes them, it will have invaded the region of mere intention, because though it is, one must admit, the whole act of harming that it will be punishing, it will be punishing a man for the exercise of his absolute right merely on account of the intention which he had in exercising it. But the case of the three dealers is divisible into three essential parts: intention in several minds; agreement—external—between these minds; and the ultimate act of selling. Thus, there is the presence of another act: that is the agreement—an act which under various forms constitutes half the basis of the Common law. This was pointed out by the Court in *Rex v. Mulcahy*,<sup>1</sup> when Willes, J., said: "When two agree to carry it (an object) into effect the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for criminal object or use of criminal means." Similarly, in the case of *Rex v. Hamb*,<sup>2</sup> Lord Campbell, C. J., spoke the following words: "Conspire is nothing; agreement is the thing."

It remains to be determined whether the agreement is an unlawful act—whether it is unlawful for two or more people to agree to cause harm to another merely for the purpose of harming him. In the case of the single dealer there is

<sup>1</sup> L. R., 3 Il. L., 306.

<sup>2</sup> 6 Cox, C. C. 167.

no purely malicious act, though there is an act dictated purely by a malicious motive. But in that of the three there is such an act, because the agreement is purely an agreement to harm. If it is an unlawful act, seeing that the loss suffered is the intended result of the act, ought not its infliction to constitute a legal injury? It is not contended for a moment that the bare agreement could constitute an actionable wrong, but that, analogously, to some other cases, such as slander of title or common instances of slander where the damage suffered from the act gives the cause of action, the infliction of loss proceeding from the agreement could form an actionable wrong. That the loss would spring directly from an intervening act—the selling—not in itself unlawful—would not, according to the opinion of Lord Brampton as to conspiracies for an unlawful object to be effected by means not unlawful, make any material difference: it would simply be the completion of the first act—the agreement—and, being contemplated by it as the means of inflicting the loss, the damage becomes directly connected with the agreement.

Besides *Boots v. Grundy*, where the prevailing judgment was that of Bigham, J., *Hutley v. Simmons*<sup>1</sup> is, also, an authority against the actionability of conspiracies to harm resulting in harm. There the jury found that the defendant had conspired with others to induce a man not to employ the plaintiff. Darling, J., reserved judgment till the Lords should have given their decision in *Allen v. Flood*. After that decision, Darling, J., in giving judgment, said that the case was not concluded by that decision, as in this case there had been a finding of conspiracy, but he considered himself bound by authority to come to the conclusion that conspiracy for an object harmful but not unlawful—holding in pursuance of the decision in *Allen v. Flood* that the object was not unlawful—did not render

<sup>1</sup> L. R. [1898], 1 Q. B. 181.



actionable the loss suffered through the defendant's acts. He cited as authorities for his judgment *dicta* occurring in *R. v. Warburton* and in the judgment of Lord Coleridge, L.C.J., in the *Mogul Case*, and, especially, the case of *Kearney v. Lloyd*. In *Quinn v. Leathem*, alluding to the case, Lord Brampton said (p. 53r), "If I rightly understand the judgment of Darling, J., in *Huttley v. Simmons*, he treated *Allen v. Flood* as a binding authority compelling him to hold that the object of the conspiracy as proved was not unlawful. in that view he rightly decided that the count for conspiracy could not be maintained. If he had held that, although the object of the conspiracy was unlawful, yet if the overt acts were not so, because they would not have been unlawful if done by one individual without any conspiracy and had decided on that ground, I should have differed."

One would probably feel much hesitation in holding such an agreement as that which has been suggested above, to be indictable. Apart from the unassailable category of combinations to commit a criminal offence, combinations to do an act harmful to public interests are those whose criminality is most firmly established. The cases that would seem to offer most authority for a contention that a conspiracy to harm is indictable are *R. v. Journeymen Tailors of Cambridge*<sup>1</sup> and *R. v. Eccles*.<sup>2</sup> In the former the defendants stood indicted for a conspiracy to raise wages: no breach of any statute was alleged or proved. In upholding the conviction the Court are reported to have said: "Yet it is not for refusing to work but for conspiring that they are indicted, and a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them or any of them to do if they had not conspired to do it, as appears in the case of *The Tubwomen*

<sup>1</sup> 8 Mod. 10.<sup>2</sup> 1 Leach, 274.

*v. The Brewers of London.*"<sup>1</sup> The last-named case was one where the subject-matter of the conspiracy was held to be prejudicial to public interests, inasmuch as it affected the King's revenue, so that it scarcely covers the wide statement just quoted, which has, moreover, more than once since, been disparagingly noticed by judges. In *R. v. Eccles* the defendants were indicted for conspiracy to impoverish a tailor by preventing him from working at his trade. On motion in arrest of judgment—the first ground being that the indictment only contained a general charge of conspiracy, and that it ought to have stated the acts which had been committed to impoverish the tailor—Lord Mansfield said, "The offence does not consist in doing the acts by which the mischief is effected, for they may be perfectly indifferent, but in conspiring with a view to effect the intended mischief by any means." But it seems probable from these words that the object was regarded as directly unlawful. Lord Ellenborough said, in *R. v. Turner*,<sup>2</sup> that *R. v. Eccles* was considered as a case of conspiracy in restraint of trade.

The *Mogul Case* affords considerable authority for the proposition, that a combination to *injure* another, resulting in damage, through acts not in themselves unlawful, is actionable. Throughout the judgments great stress is laid on the fact that the object of the defendants was the securing of profit and not the inflicting of loss, for its own sake, on the plaintiffs. Whether it affords authority for the proposition that a combination to harm resulting in loss is actionable will depend on what, in the view of the learned Lords Justices and of the Lords, would have constituted the unlawfulness of the object—whether it would be unlawful simply through being a malicious interference with trade, or whether it would only have become so through the fact of being carried out in pursuance of

<sup>1</sup> 1 Sid. 174.

<sup>2</sup> 13 East, 228.

conspiracy. Bowen, L.J., was clearly of opinion that, quite apart from pre-concert, it was actionable intentionally to damage another in his trade, if it was done without just cause or excuse. He did not think that the fact of combination carried the plaintiffs' case much further, because, he said, in order to be indictable and actionable, its object should be proved to be unlawful. Fry, L.J., considered it, under the circumstances, unnecessary to express an opinion as to whether competition directed by one man or by a combination against another, simply from malice and as a means of harming him, would be actionable or not. On the hearing of the appeal in the House of Lords,<sup>1</sup> Lord Halsbury made the following observation, which was cited by Bigham, J., in *Boots v. Grundy*, as an authority for his decision in that case. "What injury, if any, has been done? What legal right has been interfered with? Because, if no legal right has been interfered with, and no legal injury inflicted, it is vain to say that the thing done might have been done by an individual but cannot be done by a combination of persons." But to this statement he immediately added, "I do not deny that there are many things which might be perfectly lawfully done by an individual, which when done by a number of persons become unlawful." Lord Watson seems to connect the unlawfulness with the fact of concert and agreement. The judgments of Lords Field and Hannen indicate that they considered that the defendants' conduct, if malicious, would have been unlawful rather through the mere fact of being a malicious interference with trade than through being such an interference carried out in pursuance of pre-concert, Lord Hannen declaring that the latter fact may be of importance as a means of indicating the real motive of the conduct. On the whole, though so much stress was generally laid on the fact that the object of the defendants was not malicious, the balance

<sup>1</sup> L. R. [1892] A. C. 38.

of opinion seems to have been that this fact would have been likewise relevant, if the conduct complained of had been that of an individual trader only and devoid of preconcert. The different *dicta* in the *Mogul Case* appear to be open to being quoted, respectively, in favour of the contention that a conspiracy to harm resulting in loss is actionable and against the contention, as was in fact, done by either of the two judges who decided *Boots v. Grundy*, but, as a decision, the *Mogul Case* is an authority for neither.

In *Allen v. Flood*<sup>1</sup> certain observations and reservations were made as to cases of conspiracy, expressions differentiating the effect of the conduct complained of there from the effect of such conduct if carried out in pursuance of conspiracy. No little weight was given to them in the Irish Courts in deciding *Leathem v. Craig*. Lord Watson said (pp. 108, 109), speaking of *Temperton v. Russell*, that "according to the second finding (in that case), the persons induced merely refused to make contracts which was not a legal wrong on their part, but the defendants who induced were found to have accomplished their object to the injury of the plaintiffs, by means of unlawful conspiracy—a clear ground of liability according to *Lumley v. Gye*." (As pointed out by Lord Macnaghten in *Quinn v. Leathem*, this reference to *Lumley v. Gye* is obviously a mistake, but Lord Macnaghten thinks it does not impair the value of the rest of the observation.) Lord Herschell, having observed that it is a general rule of our law that an act *prima facie* lawful is not unlawful and actionable on account of the motive which dictated it, adds, "I put aside the case of conspiracy which is anomalous in more than one respect." Lord Macnaghten merely refers to the fact that there was no evidence of oppressive combination. Lord Shand says (p. 169), speaking of the *Mogul*

<sup>1</sup> L. R. [1898], A. C. 1.

Case as one of combination in pursuit of a legitimate trade object, "Combination for no such object, but in pursuit really of a malicious purpose to ruin or injure another, would, I should say, be clearly unlawful."

Lord Davey says (p. 172), "This, I will remind your Lordships, is not a case of conspiracy," adding, however, immediately, "I do not say whether, if it were, it would or would not make any essential difference."

In his judgment in *Quinn v. Leathem* Lord Lindley does not seem to favour the regarding of conspiracy as a distinct element capable of supplying a cause of action, but rather to look upon it as a matter of degree illustrating and intensifying the nature of the conduct charged. Dealing with the appellants' argument that what is not actionable in one does not become so in consequence of the concert of several, he says (p. 538), "This may be so where many do no more than one is supposed to do. . . . I am aware of the difficulties which surround the law of conspiracy both in its criminal and civil aspects: and older views have been greatly, and, if I may say so, most beneficially modified by the discussions and decisions in America and this country." Then he adds that the aggravated result of the action of many may be so intolerable as to become actionable.

In America, judges, basing their decision on the history of English law and on English cases, generally taking *Savile v. Roberts* as the leading statement of the law on the subject, have declared in terms enviable, at least, for their clearness, that an act which when done by one alone is not actionable, does not become so when done in pursuance of a conspiracy. The cases of *Wellington v. Small and another*,<sup>1</sup> *Kimball v. Harman*,<sup>2</sup> and, especially, *Hutchins v. Hutchins*,<sup>3</sup> are worth referring to on the question.

In conclusion, there seems to be authority affording ground for the proposition that a conspiracy to commit a

<sup>1</sup> 3 Cush, 145.

<sup>2</sup> 34 Md. 407.

<sup>3</sup> 7 Hill, 104.

legal injury, resulting in acts which inflict loss but are not in themselves unlawful, may be actionable, though the like result, if brought about by an individual apart from conspiracy through acts not in themselves wrongful, would not be actionable. But, on the other hand, there are some opinions treating conspiracy as of importance merely in so far as it presents a force and pressure which an individual is supposed not to be capable of exercising, and thus introducing some such feature as coercion, etc. If three successive masters of a satisfactory servant, each piqued because the servant had left his employment in order to better himself, were to agree not to give him a character, and, in consequence, he failed to obtain a place which he would otherwise have got, would he have a cause of action? If so, it must be the conspiracy that will supply it, for it is clear that each individual master—and his motive is immaterial—does nothing unlawful in refusing him a character. Possibly, it might be held that he would have a cause of action—it might be held so on the ground that there had been a combination to harm him in his work and occupation—but there does not seem to be, as yet, any clear authority for such a decision. The balance of such authority as is to be found upon the subject of conspiracy seems to be against the proposition that a conspiracy to commit a harm not in itself amounting to a legal injury, will render actionable the infliction of loss resulting from it. Though it would seem as if the cases of *Quinn v. Leatham* and *Giblan v. United Labourers' Union* were only, on some such basis, reconcilable with that of *Allen v. Flood*, one cannot maintain that such was, in fact, the ground of decision. Notwithstanding the decision in *Allen v. Flood*, the lawfulness or unlawfulness of wilful interference with another in his trade or labour has since been dealt with on the basis of the existence or non-existence of reasonable ground or excuse, and combinations to effect it have

been treated as actionable or not actionable according as the interference itself has been regarded as lawful or unlawful.

R. S. NOLAN.

#### IV.—AVIATION AND FUTURE LEGISLATION..

ACCORDING to the terms of the Draft Convention discussed by the International Conference of Aerial Navigation, it was proposed (1) that each of the contracting States should permit the navigation of the airships of the other contracting States within and above its territory under reserve of the restrictions necessary to guarantee its own safety and *that of the persons and property of its inhabitants*;<sup>1</sup> (2) that every airship must have a navigation certificate, to be issued only after sufficient tests before a public authority of a contracting State or an aeronautical association empowered by it;<sup>2</sup> (3) that every person liable to be called upon to take his place in an airship must be provided with certificates of competence recognised as valid by the contracting State of which the airship possesses the nationality;<sup>3</sup> and (4) on the proposal of M. Lardy (Switzerland), it was agreed to invite the contracting States to take measures in any case to have the flying machines in their territory provided with identification marks easily recognisable at a distance.

It is therefore of practical interest to consider under each of the above heads the lines which legislation in this country should follow. The importance of the subject is to be deduced from the fact that, although this country has not as yet considered the question, other European States have already laid down rules and regulations for the control of aerial navigation within their territories.

<sup>1</sup> Draft Convention, Chap. III, "The Liberty to Navigate," Rule 1.

<sup>2</sup> *Ibid.*, Chap. II, "Certificates."

<sup>3</sup> *Ibid.*

(1) *Restrictions to guarantee the safety of persons and property.*—The science of aviation is, as daily accidents testify, dangerous; and the more populated a district is over which flights are made, the greater the danger to the people below and to their property. If an aeroplane, whilst travelling above land neither populated nor covered with buildings, falls to the ground, little damage will be done apart from the hurt to the aviator and the injury to the machine, whereas the damage and injury which would be inflicted upon the inhabitants of an area thickly populated is too terrible to contemplate. In Prussia, the Ministry of the Interior has issued regulations which permit aerial flights by persons who have not obtained an official certificate of efficiency as aerial pilots, only above such land as is unpopulated, where there is practically no traffic, and only at specified hours of the day. Aerial pilots who, on the other hand, have obtained certificates of efficiency must, as a general rule, fly outside of inhabited places, but in certain cases this prohibition may be withdrawn. Under no circumstances, however, is it permissible to fly over factories of explosives, petroleum storehouses, or gas works.

The writer has suggested<sup>1</sup> that, in order to guarantee the safety of persons and property, an Act similar to the Motor Car Act 1903,<sup>2</sup> should be passed, and that it should in the clearest possible terms be enacted that to fly over an area which is well populated and covered with buildings, is an act of reckless driving. The writer imagines that the section would read somewhat as follows:—

1.—(1) If any person drives an aeroplane, airship or balloon recklessly or negligently, or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature and condition of the country, and the number of buildings

<sup>1</sup> *The Observer*, July 3rd, 1910.

<sup>2</sup> 3 Edw. VII, c. 36.



in, and the density of the population of the area traversed, that person shall be guilty of an offence under this Act.

(2) If any person flies above any factory of explosives, or any building wherein is stored petroleum, oil, or any other inflammable material, or any gasworks, or above any area prohibited or restricted by regulations of the Local Government Board made under this Act, that person shall be guilty of an offence under this section of this Act.

(3) The Local Government Board may prohibit or restrict the flight of any aeroplane, airship or balloon, over districts which, owing to the buildings thereon, or the population thereof, or for any other reasons, would in their opinion be especially dangerous.

It is important that the Act should create "Rules of the Road" for the air, and that the duties of aviators, in order to avoid collision, should be clearly set out. Collision regulations are necessary, not only for the safety of the public, but for the airman's own protection. The accident to Captain Dickson last year, at Milan, is a lamentable instance of the result of actual collision, whilst the serious injuries to Baronne de la Roche were caused by her fear of, and attempt to avoid, a collision of very remote contingency.

In framing collision regulations the following facts will have to be taken into consideration. In a biplane the aviator can see only straight ahead or behind; in a monoplane, if of the Bleriot type, in which the seat is placed between the wings, the aviator cannot see over the sides or immediately below; while in an Antoinette monoplane the driver is seated behind the wings, and cannot therefore see objects which are ahead of him slightly below his level. The International Aeronautic Federation has laid down the rule that at flying meetings "a competitor shall only pass another

competitor on the outside (*i. e.*, to the right), and on no consideration whatsoever shall the faster-travelling machine be allowed to pass on the inside. A competitor shall further be at liberty to pass either above or below another machine, but in any case a space of at least 75 feet shall be left between the two machines." A space "of at least 75 feet" is a necessary precaution to safeguard against "backwash." At Issy-les-Moulineaux last year Lencowitz, a Russian aviator, narrowly escaped injury owing to the sudden descent of his aeroplane, caused by the draught from the propeller of another machine passing him. These are important points which will have to be carefully considered by the framers of the Act.

(2) and (4).—It is convenient to discuss navigation certificates and the question of identification marks under the general title "registration."

*Registration.*—It may safely be assumed that every air machine will have to be registered in the same way that a motor car has to be registered under the provisions of the Motor Car Act 1903.<sup>1</sup> By sect. 2 (2) of that Act every motor car has to bear a mark indicating the registered number of the car, and the county council with which the car is registered; and it has been suggested<sup>2</sup> that a practical method of fixing to aerial machines a mark of identification and registration at once distinct and easily recognisable would be by the painting of numbers in large figures under the lower plane.

The Draft Convention provides that navigation certificates are to be issued only after sufficient tests, before a public authority or an authorised aeronautical association, and the writer strongly supports the view that State inspection of flying machines should be a condition precedent to registration. It has been pointed out by M.

<sup>1</sup> 3 Edw. VII, c. 36.

<sup>2</sup> The Editor of *Flight* in a letter to the writer.

Armengaud, an aeronautical engineer of many years' standing, who advocates the creation of "Reception Bureaux" for the examination by the State of all air machines, that flying machines, aeroplanes in particular, are at present constructed without taking into proper consideration the resistance of the material of each part. One of the features of flying machines to-day is the fixing of the wings, more particularly in monoplanes, by a network of piano wires. Whether this is a system which offers sufficient guarantee of security against the vibration and tremendous pressure to which an air machine is subjected when in full flight, or whether stout twisted steel cables would not be a safer article to use in the construction of air machines is only one of the problems which will have to be considered by the public authority or aeronautical association which the Act empowers to issue navigation certificates. In Germany, in consequence of numerous accidents, the Government requires supervision of the building of all air machines, and a detailed examination, before a certificate is granted.

(3) *Certificates of Competence.*—Under the Draft Convention every person liable to be called upon to take his place in an airship must be provided with a certificate of competence, recognised as valid by the contracting State. At a meeting of the International Aeronautic Conference it was decided that after February 15th tests for pilots' licences shall be identical in all countries connected with the International Aeronautic Federation. Every candidate will have to pass several tests, including a distance flight of a minimum of three miles without touching the ground, a height test of a minimum of 150 feet, also tests as to stopping the motor and landing without mishap or hitch within 150 feet of a fixed point.<sup>1</sup>

England is one of the countries connected with the Inter-

<sup>1</sup> These tests are only for aeroplane pilots; there are other tests, including a night ascent, for balloon and dirigible pilots' licences.

national Aeronautic Federation, and it may be assumed, therefore, that the Act will provide that every pilot and every owner who intends himself to fly, must before he is licensed pass an examination on the lines laid down by the International Aeronautic Conference. It has already been noted that in Germany a difference is made between those pilots who have obtained certificates of efficiency and those who have not; but this distinction will, apparently, be abolished by the resolution of the Conference when it comes into force.

These observations deal only with a few of the points that will have to be considered by the Government which places an Aviation Act upon the Statute Book, nor, of course, in an article of this length have those points which have been mentioned been worked out in full detail. The writer does not pretend to be a student of International law, and he has purposely, therefore, treated both the subject-matter of these remarks and of a previous article entirely from the standpoint of the private law of the land, and has abstained from bringing into consideration or discussion any question which might savour of International controversy.

H. G. MEYER.

## V.—THE PREVENTION OF DESTITUTION.

THE outstanding feature of the Minority Report of the recent Poor Law Commission, and perhaps its greatest interest to jurists, arises from the fact that, unlike the complementary majority recommendations, and contrary to the spirit of nearly every official inquiry in England, its suggestions are based upon a considered social theory.

As Mr. and Mrs. Sidney Webb have very clearly shown in their *English Poor Law Policy*, the whole attitude of our Poor Law administrators since the days of the penultimate

Commission of 1834, has been guided by considerations of the narrowest practicability. At one time, favouring extreme severity to the distressed who have to seek State assistance, at another, withdrawing whole sections of that class from the sphere of deterrent treatment, they have throughout looked only to the elimination of that particular section of the unfortunate who seek relief at their hands; the existence and multiplication of these persons elsewhere, the possibility of social contamination from the presence of this great mass of untreated human wreckages has not concerned them; indeed, that one of the submerged should refrain from applying for poor law relief, and so go unassisted or be dealt with by another authority has always been a matter of congratulation.

So also, and perhaps as a consequence of this deliberate ignorance of what goes on outside the pauper world, the Poor Law Authorities have completely failed to realise the "destitution" work done by other public authorities. To-day we are told, on reliable authority, that of the £70,000,000 spent annually on services of public assistance, services, that is, of free State provision, on public health, education, and other matters, but £17,000,000 is disbursed by the Poor Law Authorities; but we have to go to other sources than pauper ones, to the county, the borough, and the district council, to obtain this information.

Even among these more enlightened authorities, the fruits of hasty empiricism, overlap, waste, and confusion are rampant. A perusal of the Minority Report may make one wonder, not only whether that contempt of theory on which the Englishman has prided himself for so many years, is likely to assist the solution of those grave social problems with which we find ourselves surrounded at every turn, but whether this boasted absence of generalising power has not done much to produce them.

What, then, is the basic theory of the Minority Report,

the application of which is to clear up this confusion of treatment and service for the assistance of the necessitous? It is the notion of mutual obligation.

It is pointed out, both in the Minority Report and more fully in *English Poor Law Policy*, that the essential difference between the older aspect of the duty of citizenship and the new, is that the community, in addition to its demand on the individual to do his duty and fulfil his obligations to the State, is now beginning to recognise a complementary duty on the part of the State to enable the citizen to fulfil these obligations.

It is this doctrine of a mutual obligation, this fundamental principle that social health is not a matter for the individual alone, nor for the Government alone, but one essentially of joint responsibility for the individual and the community, that inspires every detail of the Minority Report. How far the difficulties which the individual has to encounter in performing his obligations determine the terms of this "indissoluble partnership," is an interesting social speculation.

We know that the removal of the fostering care of the feudal lord and monasteries produced not only the well-known social obligation of poor law relief, but also a great scheme for the provision of many other social services, the details of which have now passed into obscurity. On the other hand, it was doubtless the feeling inspired by the enormous multiplication of output produced by machinery, which induced Bentham and his followers to consider that the task for the individual to maintain himself was an easy one, requiring little social assistance. However this may be, we are compelled to recognise at the present time that the complexities of modern industrial life are such, the permanence of health or employment so dubious, that unless social assistance is given to an individual at the opportune moment, in childhood or in sickness while un-

employed and in old age, he may easily pass into the army of the destitute, not through want of ability or desire to work, but through sheer absence of opportunity.

Seen thus, the whole growth of domestic legislation, during the last fifty years, resolves itself into an abandonment of the notion of a uni-lateral individual obligation to the State, and the substitution of that mutual bi-lateral social contract of which the Minority Report speaks. For these reasons the minority would encourage national and municipal activity as a positive stimulant to individual independence.

In contrast to the *laissez faire* of 1824, this modern philosophy declares for "the universal maintenance of a definite minimum of civilised life." The community recognises a duty in the curative treatment of all who are in need of it—a duty most clearly seen in the medical treatment of the sick and the education of children. Once this corporate responsibility is accepted, it becomes a question whether the universal provision of any necessary common service is not the most advantageous method of fulfilling such responsibility. It is, moreover, an inevitable complement of this corporate responsibility and of the recognition of this indissoluble partnership, that new and enlarged obligations, unknown in a state of *laissez faire*, are placed upon the individual—such as the obligation of the parent to keep his children in health and to send them to school at the time and in the condition insisted upon; the obligation of the young person to be well conducted and to learn; the obligation of the adult not to infect his environment, and to submit to hospital treatment.

The individual retains as much freedom of choice, if not more than he ever enjoyed before. But the father finds it more easy for him to get his children educated and more disagreeable to neglect them. It is made more easy for the mother to keep her infants in health and more disagreeable

for her to let them die. The man suffering from disease finds it more easy for him to get cured without infecting his neighbours, and more disagreeable for him not to take all the necessary precautions. The labour exchanges and the farm colonies make it more easy for a wage earner to get a situation; perhaps the reformatory establishment, with powers of detention, is needed to make it more disagreeable for him not to accept and retain that situation. It is the empirical recognition of the growing necessity of the State to fulfil its obligations in assisting the individual to obtain education, health, and employment, which has produced the later "bilateral" public authorities for those respective services, and it is to these bilateral public authorities, co-ordinated to avoid overlapping, that the Minority Commissioners turn in their search for an authority to carry out the prevention and curative treatment which they advocate.

Classification also is insisted on. Of the five avenues which lead to destitution, the "condition of being without adequate food or clothing or medical aid or lodging in such a way as to cause or be likely to cause injury to health to the person who is in such condition" (Prevention of Destitution Bill, clause 4), each is placed under a special skilled authority—the Education, Health, Feeble-minded, Aged, and the authority for the Unemployed.

With the exception of the last, the Minority Report recommends that the duty of preventing destitution should, subject to a certain amount of central control, be entrusted to the larger local authorities.

"It shall be the duty of the council of every county and of every county borough," says the Bill (clause 12) in which the legislative recommendations of the Minority Commissioners are embodied, "to ascertain the extent and nature of the destitution existing among the inhabitants of their area and to take such steps as seem to them desirable, within the powers conferred upon them by Parliament, as



far as possible to prevent or arrest the operation of the causes of such destitution, and provide, in accordance with the statutes and regulations for the time being in force, whatever public assistance of persons within their area the council may deem expedient."

By this clause, a general obligation is cast upon counties and county boroughs to prevent destitution, while considerable latitude is allowed for each locality to develop its operations according to its special needs.

At the same time, a sufficient standard of classification of the four classes of the destitute and of incipient destitution is provided by a uniform statutory obligation to refer to committees, in the case of the children of school age and the aged, to the committees constituted by the Education and Old Age Pension Acts (Prevention of Destitution Bill, clauses 20 and 39), in the case of the infants, sick and the feeble-minded, to new statutory standing committees. It is a strange anomaly in local government, that while a county, which is not strictly speaking a sanitary, although it now is a supervising public health authority, is now required by the Housing and Town Planning Act of 1909, s. 71, to set up a health and housing committee, a borough which is an urban sanitary authority, while it must appoint a medical officer of health, need not (save by local Act, as at Nottingham) though doubtless it invariably does, possess a health committee.

In any case, no provision for co-optation of skilled persons on health committees exists, but this defect is remedied in the Prevention of Destitution Bill.

By clause 28, every council having public health powers under the Act must establish a health committee, and a scheme to be approved by the Local Government Board is to be prepared, allowing for co-opted women in such a way that at least two women shall find their way on to every health committee, either as elected or co-opted members.

Central control in matters of public health is provided for, as in the existing educational system, which is left untouched, and extended to cover the poor law children, by a system of grants in aid which are to be given on a new system.

In place of the present unanimously condemned subventions, a national minimum of health expenditure is to be determined by the Local Government Board, which will amount to the least sum at which a council can carry out its duties under the measure. A national standard health rate will then be calculated, as the sum in the pound required to produce this minimum sum—and, when the Local Government Board are satisfied that a council has actually expended the minimum sum or more, a grant may be made to all councils of the difference between the standard health rate and the amount by which they have exceeded it—this is to be known as the Primary Health Grant. After this, a Secondary Health Grant may be paid to other councils not entitled to a primary health grant in proportion to their expenditure. But in no case is a grant to be paid until the Local Government Board have issued a certificate testifying their satisfaction of the manner in which the Public Health Acts have been carried out. The total sum to be expended will be fixed by Parliament. £4,000,000 in all for seven years is suggested in the Bill. The principle “of necessity and ability to pay” in these proposals is in harmony with the proposals of the minority of the Royal Commission on Local Taxation which reported in 1901, and included Lord Balfour of Burleigh, Sir Edward Hamilton, and Sir George Murray. As under the Education Acts, so under the proposed measure, the larger urban district councils of 10,000, and non-county boroughs of 10,000 inhabitants, are given certain powers.

By clause 33, such a council may enter into an agreement with the county in much the same manner as is

already done by district councils under the Local Government Acts, to have certain powers as to outdoor medical attendance and the provision of medicines entrusted to them. So also in London, where the County Council is the local authority under this Bill, certain minor medical powers are transferred from the guardians to the borough councils.

The notion that the mutual obligation of society and individual may be modified in favour of the aged deserving worker, finds expression in clause 38, which gives the pensions committee appointed under the Old Age Pensions Act 1908 power to award local pensions, in lieu of outdoor relief, in suitable cases to aged persons who are not eligible, for one reason or another, to pensions under the Old Age Pensions Act. So also, the urban district or borough of 20,000 inhabitants is made an authority for this purpose. So that a borough council of under 20,000 will have health powers devolved upon them if they desire it, but no power to award local pensions.

With regard to the fourth class of the non-able bodied, the mentally defective, the Minority Commissioners adopt the report of the Commission on the Feeble Minded, and a new committee is set up by clause 42, with a similar provision to the co-option of women as exists in the case of the health committee, to which will stand referred the powers of the council to search out and cure destitution among the feeble minded, and also their other existing powers with regard to the defective which they possess under the Lunacy Acts 1890 and 1891 and the Inebriates Act 1898.

The existing Asylums Committee is abolished, and in place of the present grant in aid of 4s. per head for each pauper lunatic maintained for the guardians by the County Council, a new grant for the mentally defective services of £2,000,000 is to be distributed to the local authorities

under much the same conditions as to necessity and ability as the Health Grant.

Next follow provisions against the overlapping of the various powers and provisions for that very important enforcement of individual responsibility, recovery of cost.

At present the liabilities incurred by receiving public assistance are perplexing in the extreme. Under the Poor Law, the person receiving assistance, being destitute, is not liable for its cost, but his father, grandfather and son are. On the other hand, the person receiving hospital assistance from Public Health Authority is, under sect. 132 of the Public Health Act alone liable. Under the Education (Provision of Meals) Act 1904, the parents of every child receiving meals is chargeable. Under all these Acts the making of a charge and the recovery of it is optional on the Local Authority, but, curiously enough, under the Local Education Authorities (Medical Treatment) Act 1910, charge for treatment is made compulsory.

Instead of all this confusion, by the Prevention of Destitution Bill one uniform method of charge and recovery is set up.

New officers, the Registrars of Public Assistance, are to be appointed by the Council, and it is made the duty of the Council, a duty which the Registrar will undertake (clause 52 (A)), to charge the whole or part of the cost of the public assistance given by the Council in accordance with fixed scales of liability. But in order to make these charges it will be necessary, and it is also highly necessary for other purposes, that a common register should be kept, in a prescribed manner, in which the name and description of every person receiving any public assistance whatever is inscribed, together with the nature of the assistance given. Old Age Pension Officers and the Trustees of Charity Commission Trusts are also required to register the assistance they give, and all other charities, trade unions, friendly

societies and private persons, and the new minister, the Minister for Labour, will be encouraged to register, so that one clear record of all the assistance given to any family or person will be readily available.

Having thus obtained information, the registrar can also see that there is no improper overlapping of assistance given by the various committees. For example, to-day a woman may, and often does, receive out-door relief for the maintenance of her child at the same time that the child is being fed by the Local Education Authority, under the Act of 1906. This is to cease. Councils are given powers to set up a new committee to be known as the Public Assistance (Co-ordination) Committee, composed of members of the four Committees, Education, Health, Aged and Feeble Minded, giving public Assistance. In Scotland, where the Education Authority is still a separately elected body, and where the Lunacy Authority is generally also elected *ad hoc*, the constitution of such a co-ordination committee is made compulsory, and the local school and lunacy boards are given representatives on it; but in England its work may perhaps be done by the General Purposes Committee.

The important work of this committee will be to see that, when public domiciliary assistance is given out of institutions, there shall be no such overlap between one grant of assistance and another as exists to-day. "Every such proposed grant," says clause 55, "shall be reported in advance to the Co-ordination Committee, and except in cases of sudden or urgent necessity, no such assistance shall be given until a certificate has been issued under the directions of the Co-ordination Committee, declaring that the proposed grant does not improperly overlap the public assistance derived from any other source, and that it does not infringe the conditions and regulations in force."

If the certificate is not granted the Council must, of course, provide for the person in an institution, or they

may suspend a resolution if the certificate is withheld under it, but in any case it is the duty of the registrar "to ensure that no person entitled to public assistance shall fail to obtain it." (Clause 52.) For nothing in the Bill is to "deprive any person of his right to relief under the Elizabethan Act of 1601."

• Finally, the Registrar, in addition to preventing overlapping and seeing that domiciliary assistance is properly given, and making charges and recoveries, is to maintain "local receiving houses for temporary accommodation of persons in urgent need, but no one is to be allowed to stay there for more than a week."

This is the substance of Part II of the Bill which deals with the non-able bodied; throughout, cure is substituted for deterrence, voluntary effort under municipal control is directly encouraged (clause 19), and indeed if the work of searching out incipient destitution is to prove really effective, a very great number of voluntary school and health visitors and guilds of help will be required, acting under the Education and Health Committees. Apart from the voluntary worker, the alms-giver is provided for, since he is invited to register his gifts with the registrar, who will then be able to see that public assistance is not provided for the same purpose.

The abolition of the Guardians and the consequent break-up of the Poor Law parish, makes convenient the abolition of overseers and the transference of the whole apparatus of poor law assessment and rating, and the preparation of Jury and Voting lists, and Registration of Births, Deaths, and Marriages and Vaccination work, to the councils of boroughs and urban and rural districts; a precedent for this may be found in the London Government Act 1899, sect. 11, which made the London Borough Councils the overseers for their district. These and other transitory provisions are drafted in the Bill, but involve no new question of principle.

Part III, however, dealing with the able-bodied, presents the greatest departure from the present system. For in that part it is definitely laid down that the work of providing for the unemployed and offering them opportunities for work should rest with a national rather than a local authority.

A Minister for Labour (established in Part I) is to take over the duties both of the guardians and of the central bodies and distress committees under the Unemployed Workmen Act, and that Act which has always been considered a "probationer," is repealed.

Some of the functions of the Minister for Labour are new, and some are transferred from other departments. From the Board of Trade is taken over the Notice of Accidents Act 1894, the Boilers Explosion Acts 1882 and 1890, the Railway Regulation Act 1893, the Conciliation Act 1896, the Railways Employment Act 1900, and the Trade Boards and Labour Exchanges Acts 1909. From the Home Office the Minister for Labour would obtain all the powers granted under the Factory and Workshop Acts 1901 and 1907, the Coal Mines Regulations Acts 1887 to 1908, the Shop Hours Acts 1892 to 1899 and the Truck Acts 1837 and 1887, and the Aliens' Act 1905 (except the provisions as to expulsion orders).

As is pointed out in the Minority Report, the technique of this great department is still to be worked out, but the same underlying principle of bi-lateral obligation applies to it, perhaps with even stronger force than to the local authorities. Opportunity to see if work is to be found will be afforded by a great national system of labour exchanges directed from one of the six proposed divisions of the Ministry of Labour.

The opportunity to practice thrift and lead a civilised life will be made possible by the decasualisation of labour in the manner provided in the Bill, namely, that certain trades

will from time to time be "scheduled" as casual trades, and masters will then be required to engage their men through a common labour exchange instead of, as now, each having his own collection of waiting disengaged labourers. (Clause 77.)

Trade Insurance is the second division of the Ministry, the system favoured being the Ghent method of subvention to the trade union. To the third division, Industrial Regulation, will be assigned most of the powers transferred under the Factory and Mines Regulation Acts.

Statistical and Emigration and Immigration Divisions are to be established, and it is hoped that the extended use of sect. 18 of the Development and Road Improvement Funds Act 1909, which lays down the principle that the Treasury, in making advances in respect of the execution of any work under that Act involving the employment of labour on a considerable scale, "shall, as far as reasonably practicable, have regard to the general state and prospect of employment," will do much to smooth out the cyclical periods of unemployment by putting in hand public work, for which there was no pressing demand, at a time when private work is slack.

It is important to notice that this is in no sense mere relief work, which was the condemnation of the Unemployed Workmen's Act: and, again, the bi-lateral obligation is not lost sight of, for the State provides an opportunity, but expects the best work in return.

Finally, we are left with a willing class for whom, after every device for increasing demand, there is no labour, and with another class who will not work. To-day both these have to be maintained—under the Elizabethan law they have that right—and therefore it is proposed with regard to those who wish to labour but cannot get it, in order to keep them efficient so that they can take their place in the world again, that—



"The Minister for Labour shall establish and maintain in such districts as he thinks fit such receiving houses for temporary accommodation and such day and residential colonies and training establishments as he shall deem requisite, and shall provide and maintain for such able-bodied persons as are entitled to public assistance, and for whom the National Labour Exchange can find no employment, such physical and mental, including technological training as he shall think fit, and shall appoint and pay such officers and servants as may be required for this purpose (clause 82); and also, dealing with the problem of his family, by clause 83, when any able-bodied person required to be in attendance at any colony or training establishment of the Minister for Labour has a wife or a child or children or any other person legally dependent on him, the Minister for Labour may, if he thinks fit, grant such wife, or the person in charge of such child or children, or other dependent person, such amount of home aliment and under such conditions as the Minister for Labour may direct."

And, having thus tested out those who cannot work for want of opportunity from those who will not, in place of the present brutalising casual ward; "too good for the bad and too bad for the good," as it has been described—

"The Minister for Labour may establish and maintain one or more Detention Colonies of a reformatory character, and any able-bodied person who may be convicted of any offence under the Vagrancy Acts, or under the Children Act 1908, or of having, in such a way as to have led to any public assistance being granted to himself or any person legally dependent upon him, without adequate excuse, habitually failed to work according to his ability, opportunity, and need, for the maintenance or benefit of himself and those legally dependent upon him, may be committed by a Court of Summary Jurisdiction, if the Court so decide, to detention in any such colony for any period not exceeding twelve months, in lieu of any sentences of imprisonment imposable under those Acts for the like offence."

The Prevention of Destitution Bill, for the drafting of which the author was largely responsible, was presented by Sir Robert Price and supported by Mr. R. Harcourt, Sir George White, Mr. Barnes, Mr. Hills, Mr. Mond, Mr. George Roberts, Mr. Henry Walker, and Mr. Greenwood, and was brought up for Second Reading in the House of Commons on April 8th last, and met with a most sympathetic reception. Mr. Balfour, in particular, declared himself against permitting the permanent deterioration of those who are fit for really good work, and described it as being bad economic policy to scrap machinery. "Do not let us state," he said, "that we mean to wait until destitution has actually reached the

stage when the Poor Law machinery has come into full play before we attempt to deal with the problem." Mr. Asquith declared that he would like our Poor Law system, both the name and the thing, to cease. In all probability the Bill will once more be introduced in the coming Session, but the supporters of the measure may already fairly claim that it has received an amount of sympathetic attention in high places within a period unusually short from the publication of the report of the Commission upon which it is founded.

HENRY H. SCHLOESSER.

## VI.—A POLL OF THE PEOPLE.

SINCE last December a great deal has been said and written in England on the question of taking a poll of the people on important measures of policy or legislation, and more especially on measures which involve a change in our fundamental political institutions. This is not indeed the first occasion on which the question has been mooted. For more than a generation it has been discussed by academic politicians, and the authors of at least one well-known work suggested, more than twenty years ago,<sup>1</sup> that the question of Home Rule for Ireland might be settled for good by a poll of the nation. But Mr. Balfour's recent declaration in favour of a poll on the question of Tariff Reform, and his challenge to Mr. Asquith to ask for, and accept the result of, such a poll on the Irish question, have given to the subject an importance which it never before possessed. Accordingly, our political writers have cast about for precedents in the colonies or foreign countries, and have

<sup>1</sup> Adams & Cunningham, *The Swiss Confederation* (1889). To save my readers trouble I have avoided giving authorities for the information in this article by means of separate notes. A list of the books which I have consulted will be found at the end of this article.

cited these, with a view to enforcing arguments for or against the proposed change. Whatever else may be said of Mr. Balfour's epoch-making speech at the Albert Hall, he certainly made one mistake, and that was giving to the suggested poll of the people its Swiss or Latin name, which is long, obscure, and not understood of the million. A poll of the electors is not a rare occurrence in the little worlds of our local government<sup>1</sup>; and the device of taking a poll of the people is nothing more (or less) than using for the greatest affairs of the nation a political weapon long familiar on the narrower battlefields which surround the parish pump. In one at least of our colonies, and in many foreign countries, the polling of the people is a well-known device. It exists in many of the States of the United States of America, where, owing to the disrepute into which local legislatures have fallen, it is increasing every year in popularity. It has recently been introduced by Statute into the Commonwealth of Australia for the purposes of constitutional amendment,<sup>2</sup> and into the Colony of Queensland, where it is apparently to be used in case of conflict between the two Houses of Parliament. But it is best known to us through the federal and cantonal Constitutions of Switzerland where it has been in existence for centuries, is found in many different forms, and has served to solve many difficult problems.

I do not propose in this article to deal at length with the Australian and American precedents. The first of these are as yet on their trial, and no information can be given as to

<sup>1</sup> It is necessary for the establishment of a market place by an urban authority (Public Health Act 1875, s. 166), for authorising expenditure by a borough or urban district in promoting a Private Bill (Borough Funds Act 1903, s. 1), and, in certain cases, in connection with the Public Libraries Acts (Public Libraries Act 1892, and *Glen's Public Health* (1906), Vol I, p. 1694).

<sup>2</sup> If one House of the Commonwealth Parliament twice carries an amendment of the Constitution, and the other twice rejects it, a poll of the Australian electors is taken on the question at issue.

how they work. The Queensland Referendum Act of 1908 was designed to enable Radical legislators to have their way when Conservative members of the upper house opposed their desires, and to coerce the Governor into presenting measures for the Royal Assent when they had been approved of by a poll of the people; but whether the people will vote as their Radical leaders expect them to do we have yet to learn. In the United States appeals to the public have been introduced freely into the Constitutions of the several States, and Mr. Oberholtzer<sup>1</sup> and Mr. Lecky show that the institution is popular as a protection against the jobbery and dishonesty of the local legislatures of the American Federation. In Switzerland, as I have said already, the appeal to the people exists and flourishes both in the local and the federal Constitutions, and the States into which it has been introduced in recent times have all followed—though they have usually varied—the arrangements found in the Swiss Republic.

The history of Switzerland is very interesting to arm-chair politicians, but it is not my purpose to pass it even in the most rapid review. The fundamental political characteristic of the Swiss peasantry is provincialism tempered by fear. From the oldest times the dwellers in the Swiss valleys were unconquerably provincial, hating every form of government which they could not see, and opposing all expenditure from which they did not derive instant benefit. In the old Swiss Confederation, which lasted with some vicissitudes from the fourteenth to the eighteenth century, there were occasionally Federal sessions at which representatives of the several cantons met. Sometimes these representatives had authority to conclude arrangements for common defence and so forth; but at other times they were only commissioned for hearing and referring (*ad audiendum et referendum*) to their several cantons such proposals as

<sup>1</sup> See the bibliographical note at end of this article.

might be laid before them. This arrangement is the root from which sprang the *referendum* (the appeal to and poll of the people) in the Constitution of modern Switzerland. In many of the various cantons, too, there existed for centuries back *Landesgemeinde*, or occasional meetings of all male citizens, by whom all laws proposed for the government of the canton had to be approved. This institution was the parent of the modern appeal to the people as it exists in the various cantons. It was also, probably, the parent of the right of the Swiss citizens to initiate, by a certain procedure, legislation for the whole Republic, a right now known as the "Initiative." The "Initiative" is the *ne plus ultra* of democracy; and it seems to me to be the corollary from the right of the people to demand a poll on a Statute passed by the Federal Parliament. Once admit that the people have the right to revise and overrule the individual legislative Acts of Parliament, and it is impossible, I contend, to withhold from them the right to take the first step in legislation themselves. The right may be given subject to conditions, but cannot be altogether withheld. At present, however, nobody proposes to introduce the "Initiative" in England. Mr. Balfour has only suggested that for certain purposes, to be settled from case to case by the Government, a poll of the people should be taken on the work, proposed or completed, of the Legislature. I therefore leave "Initiative" aside for the moment, and state briefly what are the arrangements in Switzerland for an appeal from the Legislature to the nation by way of a general poll.

For this purpose, we need not now go further back than the Constitution of 1874. That instrument preserved the arrangements which had been made in the Constitution of 1848 for a general poll in all cases of *constitutional* change. It added to them other provisions by which a general poll was authorised, in the case of any law or executive order,

"of a general extent," on which such a poll is demanded by 30,000 citizens or eight cantons.<sup>1</sup>

The provisions for change of the Swiss Constitution are simple enough, and may be fully set out in a small space. These provisions were inserted in the Constitutions of 1848 and 1874, and were modified in 1891, so as to remove any doubt as to the right of the people to be consulted as to *partial* (as distinguished from *total*) changes in the Constitution.

As amended in 1891, the relevant Articles of the Constitution read as follows:—

Art. 118.—The Constitution of the Federation can be revised at any time in whole or in part.

Art. 119.—Total revision must be carried out by means of Federal legislation.

Art. 120.—If one section of the Federal Assembly [*i.e.*, one House of Parliament] votes for total revision, and the other section does not agree to it, or if 50,000 electors demand the total revision of the Federal Constitution, the question of such revision must be submitted to the vote of the Swiss people.

If in any such case the vote of the majority of citizens voting is in the affirmative, both Councils (*i.e.*, the Upper and Lower Houses of Parliament) must be elected afresh for the purpose of taking in hand the total revision of the Constitution.

Art. 121.—Partial revision may be undertaken by means of popular proposal (Initiative), or by way of Federal legislation.

Popular proposal consists of a request made by ~~50,000~~ 50,000 Swiss electors for the enactment, repeal, or amendment of a particular article of the Federal Constitution.

<sup>1</sup> But see the reservations in the text of Art. 89 below. These two sets of provisions are known among the writers on this subject as the "Compulsory Referendum" and the "Facultative Referendum." To avoid using such very long words I have explained their meaning shortly.

If, by means of popular proposal, several different matters are put forward for revision or incorporated in the Constitution, each of these must be deemed to be the subject of a separate request.

Requests may be in the form of a general proposal or of a settled scheme.

If such a request is in the form of a general proposal, and the federal councils agree to it, they must elaborate it in the sense required by those who initiate it, and submit it to the proper cantons for rejection or acceptance. If they do not agree to it, the question of partial revision must be submitted to the vote of the people, and, in so far as it is approved of the majority of voting citizens, the revision of the Constitution must be taken in hand by the Federal assembly (*i. e.*, both Houses of Parliament).

Art 122.—A Federal law will prescribe particulars relating to procedure in the case of popular requests and voting of the people.

Art 123.—The amended portions of the Constitution become operative if accepted by the majority of the citizens taking part in a popular vote and by the majority of the cantons.

In ascertaining the majority of cantons, the vote of a half-canton counts as half-a-vote.

The result of the vote of the people in each canton is to be deemed to be the vote of such canton.

The translation of such passages as the foregoing, containing a number of indefinite expressions, is never quite satisfactory, but I think my translation gives the provisions of the Swiss Constitution with reasonable accuracy. A careful inspection of these rules shows that the Swiss people have two distinct rights. They may revise the Constitution as it stands, and they may put new provisions into it. It has never been laid down—probably it could not be laid down—what measures are constitu-

tional and what are not, and what laws or regulations can be placed in the framework of the Constitution, and so hedged about with constitutional sanctity. If 50,000 people can be found to sign a request that a clause shall be placed in the Constitution regulating the speed of motor cars or the muzzling of dogs, and annex to their request a settled scheme for legislation upon either of these subjects, and if the other conditions precedent to constitutional amendment can be satisfied, the speed of motor cars and the muzzling of dogs may become as much a part of the Constitution as the duration of Parliament or the qualifications of electors. As a matter of fact, this machinery has been used in Switzerland for purposes which are wholly foreign to the purpose of constitutional amendment as usually understood. Thus in 1892, when an anti-Jewish movement was on foot in Switzerland, the anti-Semites seized the opportunity to embed in the Constitution a measure prohibiting the slaughter of animals in the Jewish fashion.

With regard to total revision of the Swiss Constitution, then, the appeal to the people is taken near the beginning and at the end of a period of revision. Before the people are first polled, a good deal must have been done. The movement for revision must have commenced either in the Upper or Lower House, or in both (in agreement), or else must have been started by 50,000 electors. If the two Houses of the Swiss Parliament are found to be in agreement as to the total revision, whether it is proposed by one of the Houses or by 50,000 electors, there is no need for the preliminary poll of the people. The Houses at once revise the Constitution and present it, as revised, for a poll. But if the movement in favour of revision comes either from one House of Parliament only, or from 50,000 electors (either with or without the assent of one House of Parliament), then there must be a preliminary poll of the people on the



general question, "Shall the Constitution be totally revised or not?" If the people vote "Yes," the next thing which must take place is a general election.

This of course gives time for elaboration and comparison of competing views as to the coming revision. The newly elected Parliament then works out the revision and presents the result of its labours for final approval of the people; but the result does not become law unless approved by the majority of the people and the majority of cantons.

It is clear, therefore, that either House of the Swiss Parliament, by opposing that revision, can face a first appeal to the people. Even though 50,000 electors petition for total revision, yet, if either House opposes it, a first poll of the nation must be taken before anything is done. Then, if the people are generally in favour of revision, there is a general election, with its accompanying process of sifting views and educating voters, and then, after the revision has been worked out in detail, there is a second—or really a third—poll, at which the majority of voters and of cantons must approve the change before it can become law.

• Partial revisions of the Constitution, or the addition of an article to the Constitution, may be effected with less difficulty than total revision; for in these cases no general election is necessary even in the cases where one House agrees to the suggested alteration and the other does not. If the two Houses agree to the proposed alteration, and it is framed in general terms, they work out a scheme in accordance with the general proposal and submit the scheme to a poll of the people. If they do not agree to it, there is a first poll of the people on the general issue, and if the people vote "Yes," a scheme is at once worked out by the Legislature and presented for a final poll. If the partial change proposed is presented in the form of a settled scheme, and both the Houses do not agree to it, a contingency arises for which the Swiss Constitution has made

no provision. The framers of that Instrument left a gap in their work here; and if we import their machinery into England we shall have to fill it up.

The conditions necessary for a change of the Constitution being so many and so difficult of fulfilment, it might be expected that such changes would be few and far between. But this is far from being the case, and although between 1875 and 1911 no fundamental changes have been made in the Constitution, the people have polled again and again on public questions, and the curious reader may easily collect and compare the results of these numerous polls.<sup>1</sup> The grave scandal of different marriage laws in different States, which is such a reproach to the United States of America, was avoided in Switzerland by an amendment of the Constitution (in 1875), rendering civil marriage compulsory throughout the Republic. In 1877 a Factory Act was passed as an amendment to the Constitution. The State purchase of the railways was accomplished in the same way by additions to the Constitution in 1879 and 1898, and the cantons were set free to make their own laws as to capital punishment by a constitutional amendment in 1879; but a law making vaccination compulsory was rejected by a large majority in an appeal to the people in 1882. In 1892 the anti-Semitic law, prohibiting the slaughter of cattle in the Jewish manner, was carried as a constitutional amendment by a large majority, on a poll of the people, after it had been rejected in both Houses of Parliament; and in 1894 the people refused to make it a part of the Constitution that the State should guarantee remunerative labour to every citizen. In March, 1903, a new tariff, which increased the protective duties on goods imported into Switzerland was put *en bloc* to the people and approved, on a poll, by 327,000 to 229,000.

<sup>1</sup> See Adams and Cunningham, *The Swiss Confederation*, p. 83, Curti's Appendix at the end of his work *I.e. Referendum, &c.* (p. 297 *seq.*), and the *Annual Register* for 1890—1910, in which the most important popular decisions are given, either separately or in collected abstracts.

The towns and industrial parts of the country voted against it, but the country people supported it—a remarkable episode, and one which might well be cited and studied in England. In 1907, the people approved by their votes a Federal military law which slightly increased the burden of military duty on every male citizen, and on which the Socialists obtained a poll of the people by whipping up over 30,000 voters.<sup>1</sup> In 1908 the Federal Legislature was authorised by an amendment of the Constitution to make a law as to trades and professions; and in 1909 a Statute prohibiting the manufacture, sale, importation, and storage of absinthe throughout the Confederation, was approved, on a poll, by 327,000 to 136,000.

A number of other cases might be cited, and the matters which have been the subject of these appeals have varied very much; but it is noticeable that none of them has really touched the framework of the Constitution, which exists in 1910 as it was moulded in 1874. In a Federal State the question of jurisdiction, as between the Federal and the State authorities, is certain to come up frequently. In Switzerland the general tendency has been to increase the power of the central authority at the expense of that of the cantons; but apart from this, it may be said that the Swiss people have, on the whole, shown themselves conservative, and that no serious modifications of the Constitution have been passed or even initiated by popular vote.

Great efforts have been made to induce the Swiss people to exercise, when occasion arises, the right which the Constitution gives them, and the Swiss Legislature have not, I believe, yet gone so far as to make voting compulsory<sup>2</sup> on pain of a fine (as has been done in some provinces in Austria), but it has been provided that all polls shall take

<sup>1</sup> For as to comply with the requirements of Art. 89 of the Constitution of 1874, which is mentioned below.

<sup>2</sup> But see the next note.

place on a single day, and that a Sunday, and the polling booths have been brought up into the most remote districts, so that voters may have no excuse for not voting. On the whole, the Swiss citizen votes with a fair amount of energy, but there have been special occasions on which he has been slack in the performance of this civic duty. Thus, in 1884, when there was a poll on the question of the reorganisation of the Ministry of Justice, and on the expenses of the Swiss Legation at Washington, only 60 per cent. of the total electorate voted, and in the canton of Neuchâtel only 26 per cent.<sup>1</sup>

The provision for an optional poll of the Swiss people, known by the pedants as the "*facultative referendum*," is contained in the eighty-ninth article of the Constitution. The relevant portion of this article may be translated as follows:—

"Federal laws and Federal decrees which are to be in force throughout the Republic must, unless they are of an urgent nature, be submitted to the people for acceptance or rejection if such a submission is demanded by 30,000 citizens who are entitled to vote, or by eight cantons."

The demand must be made within 90 days of the publication of the law; and, in fact, no Federal law, except it be of an urgent nature, takes effect until 90 days after its publication, when the time for challenging it expires. This provision is not of great value to the people of the Republic, for the Legislature can always, as it seems, vote that a measure is "of an urgent nature," and so oust the right of the people to call it up for a popular poll. It has been used occasionally in Switzerland, but as I do not understand it to have been in Mr. Balfour's contemplation on the occasion of his recent speech, and as this article is

<sup>1</sup> Apathy is greater in the case of cantonal polling (see Hyman, *op cit.*, p. 112 and 112 n.), and on this account the Zurich Government authorised the local authorities to insist on the exercise of the right, to impose a fine for abstention and to permit voting by proxy.

likely to be quite long enough without it, I leave it aside for the present.

When Mr. Balfour suggested that Tariff Reform should be submitted to a poll of the people, and asked that Home Rule should likewise be put to a popular vote, he must have had some such arrangement as that provided by the Swiss Constitution in his head; but we do not know, and it is probable that he did not himself know, how or with what modifications the rules of the Swiss Constitution might be introduced and used in this country for the solution of these two questions. His critics fastened on the fact that his statement was (necessarily) vague and general, and used this fact to ridicule the idea that the questions of Home Rule or Tariff Reform could be settled by referring them to a poll of the nation: but it is by no means certain that a popular vote on the general principle, followed in due course by a popular vote on an elaborated scheme, might not avail to settle one or both questions. If we may suppose the Swiss rules to have been transplanted into this country, the question of Home Rule might be laid before the people in at least two ways. Mr. Redmond's followers, to the number of 50,000,<sup>1</sup> might demand generally a revision of the Act of Union in the sense of giving Ireland self-government; or they might accept from their leaders a settled Home Rule bill *in toto*, and submit it to Parliament with a request that it be passed. Either House of Parliament might also pass a general resolution in favour of Home Rule, and, "if the other House did not agree, a general vote might take place." In any of these cases, if the general vote showed a majority in favour of the principle of Home Rule in Ireland, a fresh General Election would take place, and

<sup>1</sup> In this country I presume the number required for a change of this kind would be far larger. When the 50,000 rule was laid down in Switzerland in 1874 the population of that country was about 1,500,000.

the new Parliament would elaborate the scheme of Home Rule. When complete, the scheme would be submitted again to the popular vote before being presented for the Royal Assent.

The difficulty in applying the Swiss rules in this way is that the real objections to Home Rule would be encountered midway between the stage of general assent and the stage of assent to a fully elaborated measure. Home Rule in its largest sense means a great deal: an Irish Parliament, with some, though limited, powers of legislation, with an Executive responsible to it, and a Civil Service ruled by that Executive; the control of the police; the right to appoint judges and sheriffs; the right to raise a revenue by taxation. There are many English electors who, though they would vote, generally, for Home Rule would not for any or all of these. The best way, therefore, and, as it seems to me, the only way in which the Swiss rules could be usefully applied to solve the question of Home Rule is, that the first or general resolution submitted for public approval should contain a number of particular propositions dealing with the principal matters on which controversy is likely to arise. Thus, let us say:—

“Are you in favour of establishing a Home Rule Parliament in Ireland, of giving it power to legislate on a, b, c, d and e, and of creating an Irish Executive subordinate to that Parliament?”

“Are you in favour of placing the Civil Service in Ireland under the control of such an Irish Executive?”

“Are you in favour of entrusting to an Irish Government the appointment of judges and sheriffs in Ireland, the control of the police, the right to raise revenue by taxation, and to control education?”

These and one or two other general propositions, involving the most controversial points in the Home Rule question,

might be submitted to Parliament, and, concurrently or otherwise, to a first poll of the people. If it be objected that Mr. Redmond could not be asked to tabulate his scheme in advance, the answer is, that the Home Rule question has so long been before the public, both in England and Ireland, that such a request could not be said to be unreasonable. Let us suppose, then, that such a set of propositions were prepared by Mr. Redmond and his followers and, after receiving their assent, were submitted to Parliament and to a first poll of the people. If the people, and both Houses of Parliament, assented, the scheme might be elaborated; but if either House rejected them, and the other and the people assented to them, then there should be a General Election before the elaboration of a scheme was taken in hand.

I have already mentioned that the Swiss nation found no difficulty in voting on the question of the alteration of the tariff; and it does not seem to me that there is any insuperable difficulty in presenting either a general, or a settled and special, scheme of Tariff Reform to the nation at large. The opponents of Mr. Balfour's suggestion base their arguments chiefly on the ground that a tariff for Great Britain must necessarily be a highly complicated measure, abounding in details, and accompanied by long lists of particular imported articles upon which it is proposed to lay a duty. If the experience of Switzerland is any guide for us in this matter, it shows that this supposed difficulty can be overcome; and a beginning might certainly be made by asking the Tariff Reform leaders to present a scheme which would satisfy them—at all events as an instalment. This scheme might take the form of a Finance Bill with Schedules, and such Bill might be laid before Parliament and submitted to a preliminary poll of the nation, the same procedure following as has been suggested in the Home Rule case. To say that if such a Bill were sent to the people

there would be endless cross-voting is no argument. Such cross-voting must take place in the case of any measure or proposal which goes beyond the merest generalities. The object of a poll of the people is to ascertain the general opinion of the nation, not the particular opinion of each of its citizens. Given an assent of the people at the polls to the Finance Bill presented to them, it would still remain open to the Free Trade legislators to combat in debate in the Houses the particular proposals to which they objected.

One or two serious difficulties remain to be considered. The first is that the House of Commons is returned by areas, by divisions of counties and boroughs, whilst the poll of the people which is suggested would be a poll of the people at large. Whilst the present inequalities in our representation system remain, it is quite possible that a majority might be returned to the House of Commons in favour of Home Rule or Tariff Reform, whilst the nation, counted by heads of voting citizens, might be against it. This difficulty must endure unless we have either a drastic Redistribution Act or proportional representation; and it therefore appears to me that, before we can think of introducing a poll of the people into the United Kingdom, one or other of these reforms must be carried out. Otherwise there may be a long period, or constant recurrence, of differences between the opinion of the people as expressed through their representatives, and their opinions as shown by their direct vote; a state of affairs which no man can approve.

The second difficulty, and one which I think is most serious, is that the introduction of national polling into our Constitution involves, by implication, the abolition of the veto on legislation vested in the Crown. The right of the Crown to veto is older than all our institutions, and the powers which have been acquired, in many centuries,



by Lords and Commons are all subject to the Royal prerogative. But the prerogative of the present dynasty, whose title is rooted in an Act of Parliament, is something different from the prerogative of Norman or Angevin monarchs, who ruled by right of conquest, or because no one was strong enough to displace them; and it is safe to say that the prerogative of the Hanoverian dynasty in England can only be exercised nowadays in accordance with, or so as to appear to be, the voice of the people.<sup>1</sup> If this be the correct view, it follows that the introduction of machinery by which the people can at all times make their voice heard, would destroy the reason for the existence of the veto: and *cessante ratione legis cessat ipsa lex*. Those who support the introduction of popular polling into England must face the fact that it involves the abolition of the Crown's power in legislative matters. This is a great change, and could not be forced on the Sovereign *in invitum* without a revolution. Unless, however, the Sovereign consents, either willingly or unwillingly, to part with the greatest and, as I think, most valuable of all his rights, even the preliminary steps for introducing "the referendum" into England cannot be taken.

R. P. MAHAFFY.

*Bibliographical Note.*—The following books, &c., have been consulted in preparing this article, but the list does not pretend to be an exhaustive catalogue of the numerous works dealing with this subject:—

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<sup>1</sup> Liberals will no doubt say that the Royal veto in England is obsolete and extinct. I do not agree with this view. It is obsolete for ordinary legislation; but it is not, I hold, obsolete when fundamental changes, affecting the framework of the Constitution, are in issue.

## VII.—CURRENT NOTES ON INTERNATIONAL LAW.

### *The Knight Commander Case.*

AN echo of the *Knight Commander* case is to be found in the Law Reports for 1910 (2 K. B. 1021, *Markt v. Knight S.S. Co.*). It will be remembered that the ship was sunk by the Russians on suspicion of carrying contraband; it seems that the prize courts in Russia are still engaged in making up their mind about the case. Meanwhile, shippers desired to sue the owners in England on the bills of lading: and one of these firms issued a writ claiming damages, "on behalf of themselves and others, owners of cargo lately laden on board," and in a letter they gave the names of forty-four such other cargo owners. There would be no harm, we think, in the forty-five owners joining in a single action: but to allow one to claim to supersede the rest was an extension of chancery procedure to commercial cases which did not commend itself to Vaughan Williams and Moulton, L.JJ.; though it did to Buckley, L.J. The whole court was of opinion that the writ as it stood was bad, and that the class of suitors would have to be better defined even if a representative suit had been possible. The judgment of Moulton, L.J., contains a most useful statement of the difference between an action with joint plaintiffs and a representative action. Parties joining in an action are severally liable for costs, for possible security, for answers to interrogatories, and so forth. These responsibilities would be evaded if representative actions were indiscriminately allowed. "The proper domain of a representative action is, where there are like rights against a common fund, or where a class of people have a community of interest in some subject-matter." Vaughan Williams, L.J., distinguished *Bedford (D.) v. Ellis* (L. R. [1901], A. C. 1), on the ground that the rights of the respondents, there had a common origin in a single instrument.

### Foreign Citation.

A point which has frequently been before the Divorce Court in one shape or another in recent years, was the subject of a judicial pronouncement in *Rayment v. Rayment* (L. R. [1910], P. 271). Can a co-respondent be cited abroad so as to make him amenable to the English jurisdiction? In the practice of the Common-law courts, he might perhaps be a ". . . proper party to an action properly brought against some other person duly served within the jurisdiction" (R. S. C., O. XI, r. 1 (g)). But this does not, at any rate *proprio vigore*, apply in Divorce. Nevertheless, in a somewhat rhetorical judgment, Sir S. Evans showed himself deeply impressed with the doctrine of the Order just quoted, and "saw no reason why the service of the petition and citation . . . should not place [the co-respondent] on a similar footing with regard to jurisdiction as a defendant properly served with a writ out of the jurisdiction under Order XI in the King's Bench Division." "If not," the learned President proceeds, "what substitute has a wronged husband got in this country for the remedy by action in England for criminal conversation, which was taken away from him by the Act of 1857?"

The answer is plain. In 1857 he virtually had no such remedy against a person outside the jurisdiction at all. Foreign service under the Common Law Procedure Act 1852, s. 18, was limited to cases where the cause of action arose within the jurisdiction.

The President displayed little regard for a long chain of cases in which the court emphatically repudiated the principle of assuming jurisdiction to cast a foreigner in damages, because of his alleged misconduct with a person whose husband was then, or had subsequently become, domiciled in England. In *Baker v. Baker* (L. R. [1908], P. 257), Bucknill, J., dismissed a domiciled Irish co-respondent. It is true no damages were claimed against him—but the learned

President is hardly justified in laying stress on the acquiescence of the petitioner: Bucknill, J., took the express ground that the co-respondent "is a foreigner, and this Court has consequently no jurisdiction over him." In *Gaynor v. Gaynor* ([1862], 31 L. J. (P. & M.), 116), a (domiciled?) Italian or Swiss was dismissed by Cresswell, J.O. In *Grange v. Grange* (L. R. [1892], P. 245), a domiciled German was dismissed by Jeune, P. In *Levy v. Levy* (L. R. [1908], P. 256), Bucknill, J., dismissed a domiciled Frenchman. In *Boger v. Boger* (*ibid.*, 300), Deane, J., did the same. In *Fairfax v. Delacrux* (not reported, 1909), Barnes, P., dismissed a (domiciled?) Dane: and he dismissed a domiciled New Zealander in *I'Anson v. I'Anson* (not reported, 1909). The same course was taken by Bigham, P., in *Walter v. Walter* (*ibid.*), (Austrian domicile). In these three cases, however, a doubt appears to have been felt by the court as to the exact bearing of domicile on the question. As they are unreported, we can only point to the fact that the co-respondent was dismissed in each instance.

In *Wilson v. Wilson* (L. R., [1872], 2 P. & M. 353), the co-respondent (domiciled in Scotland) was dismissed by Penzance, P., but as the result of a proceeding whereby the petitioner abandoned the suit altogether.

The learned President did not distinguish these cases as involving the subjects of a foreign State as co-respondents. He simply declared that they were not binding authorities, without stating the grounds on which they were to be distinguished. He supported his decision assuming jurisdiction, by reference to a Scottish case, *Fraser* ([1870], Scot. Sess. Cas., 3rd Ser., VIII ["8 M."], p. 400): and he suggests that the Court of Session there sustained its jurisdiction over an English co-defender who had no connection with Scotland. In fact, the co-defender had the very real connection (from the point of view of Scottish principles of jurisdiction), that he was tenant of heritable subjects

there. Needless to say, that is not a ground of jurisdiction which is recognised in England: but it makes the case worthless as an authority, except to show that some definite and tangible personal subjection to the jurisdiction must be proved. Properly examined, it is an authority against the President's view. "It is settled" says Lord Kinloch, "that the proprietorship of landed property within Scotland creates jurisdiction to the Scottish Courts:" and he also says "The Conjugal Rights Act . . . . assun jurisdiction; it does not create it. To confer such jurisdiction where it was not antecedently possessed, would require a very express and unambiguous enactment: and none such, I think, occurs. No such thing, I think, was intended as to give the court power to call, *de plano*, an alleged co-adulterer from the furthest corner of the globe, whether he was subject to the jurisdiction or not."

Of course the whole difficulty is created by the Divorce Acts, in England and Scotland alike, taking a pure Common-law action and inserting it into divorce procedure, without making proper and adequate provision for the processual consequences. Instances of this are to be seen in such cases as *Bernstein v. Bernstein*, where the position of a co-respondent in regard to condonation was left in hopeless confusion.

### Occupation.

What length of time will suffice to determine the sovereignty of a power which takes possession of an uninhabited island by formal acts of ownership, and then leaves it to itself? In the well-known S. Lucia case it was considered that a ten years' abandonment of an island to the wild natives (between 1640 and 1650) extinguished the prior rights of England. The much smaller Island of Clipper-ton, in the Pacific, was taken possession of by France in

1858. Being a mere rock, without economic importance, nothing has been done since to preserve French sovereignty over it, and Mexico has now annexed it. As we saw, when treating the case of Spitzbergen (*L. M. & R.*, Vol. XXXIII, p. 83), there is no reason to expect a State to exercise overt acts of sovereignty in barren and worthless regions forming part of its dominions. We must think, therefore, that the island continued to be French for many years subsequent to 1858. But to make the sovereignty continue automatically for half-a-century would be to carry the consequences beyond what would seem altogether reasonable. The present importance of Clipperton, as a post commanding the western mouth of the proposed Panama Canal has been obvious for at least twenty years: if we say that France remained the owner of Clipperton, without taking any trouble, for thirty years, *i. e.*, until 1888, we shall probably be giving her a little more than her strict due. The case is to be referred to the arbitration of the King of Italy. It may be added that Clipperton (so named after an English buccancer, an associate of Dampier's) stands sheer out of the Pacific Ocean, some 600 miles from Acapulco, and is about four square miles in extent. Clipperton is unknown to the *Diet. of Nat. Biog.*, but is noticed in *La Grande Dictionnaire* of Larousse.

### Localism.

We wish to bring to our readers' notice a most interesting movement which has been set on foot in Denmark. Denmark is, as everybody knows, the country *par excellence* of agricultural co-operation; and the neighbourly combination which has proved so brilliantly successful in the economic sphere, recommends itself as likely to have equally good results in the political. The root-idea of the "Localists" is that people ought to be governed by those who know them best: that instead of the hard abstractions of centralised

legislation imposed from without, the greatest possible portion of the law ought to be the free choice of free individuals who have personal knowledge of each other. To preserve the peace and to enforce justice between these autonomous groups, "Localism" recognises wider and wider circles of authority with correspondingly diminished powers. What we would term "supreme" power rests with the smallest organism: the powers of the larger are in the main supervisory. This is natural: the common consciousness of those who do not personally know each other is very limited, in comparison with the common consciousness of a small group. The unit group with full autonomy, Localists in Denmark take to be the commune or parish. The wider groups extend from the District and County to the Province, Kingdom and Confederation. Within the unit group the Family is recognised as invested with a certain independence.

In short, the proposed World Organisation is a federation of federations. It can easily be seen that such an organisation would be very elastic. It would have the same relation to a centralised State that a wire gun has to a smooth-bored tube, or a spring-lung carriage to a waggon. The promoters of the movement admit that the world is not ripe for anything like an universal application of the principle, but they have some reason in thinking that a beginning might be made. It will be seen that the adoption of the scheme would act as a kind of universal political solvent. Home Rule would cease to be a practical question: so would the powers of the House of Lords, and even Socialism itself. At the same time the interest and value of country life would be immensely increased, and the rush to the towns might to a large extent be checked. Everywhere there would follow an increased sense of self-respect. The free man would no longer be a powerless voting item. Probably the only question which would remain urgent, of

those which at present agitate politicians, would be that of the Suffrage.

Dr. H. Torbøl, of Norre Nebel, Denmark, is the protagonist of the new movement, and has drawn up an explanatory pamphlet detailing its aims, which will prove of considerable interest to political students.

### The Flushing Defences.

The uneasy equilibrium of Europe at the present moment has led to general attention being drawn to what would otherwise pass without much comment—the proposed fortification of Flushing, at the mouth of the Scheldt, and the general strengthening of the sea defences of Holland. It may be suggested to those who see the Machiavellian hand of Germany behind these proposals, that Holland is strong against armies, and weak against navies. What the forces of Alva, of Louis, and of Cumberland could not do, it is improbable that the troops of other Powers could accomplish. The invincibility of the Dutch method of defence by inundation has long been a proverb. But against naval attack, inundation is powerless. Let it be conceived that Germany were desirous of violating the neutrality of the Netherlands, and of using the Dutch ports as bases for action in the North Sea. Let, then, Germany move against the Netherlands' land frontier: she has a long and costly campaign to face before she can attain her end, if she ever does. Let her, under the same circumstances, effect a *coup* against the Netherlands sea frontier: she may succeed at once. It may well be, therefore, that it is the growth of the German navy that has stimulated the attention of Holland to her sea defences. The British navy is not suited to the operation of attacking these shallow waters: the German navy is especially designed to manœuvre in shallow seas, such as are found on the Frisian and Baltic coast. The *Times* correspondent admits the force of this



reasoning, but as it hinges on the efficacy of the inundation-defence, he dismisses this cardinal consideration with the remark that (1) the inundations have never been tried; (2) the *waterstaat* "will in all human probability act too late." The latter observation is obviously beside the mark, unless the Dutch Government concurs in it (since it is the intentions of the Dutch Government which are at issue); and if it does, it is singular why it should maintain a *waterstaat* at all.

But it is hinted that Europe in treaties render it improper for Holland to seek to command the access to the Scheldt. Antwerp lies higher up that estuary and might thus be cut off from the sea. The Four Powers have promised to protect Belgium. We can only say that the argument cuts both ways. If a foreign Power were to violate the guaranteed neutrality of Belgium, and to invest or occupy Antwerp, the new fortifications would be incalculably valuable in bringing that Power to book. It cannot be assumed that power will only be used for purposes of illegality. If Holland is legally entitled to make herself strong on the Scheldt, we have no right to presume that she does so with improper and illegal motives. She was called upon to make great sacrifices, for the peace of Europe, in 1830, that is no reason for expecting her to make further sacrifices now, and to regard the sacred stream of the Scheldt as a thing taboo. We are gravely told that Desimp, Guillaume and Nys all maintain the view that Holland is bound by all the engagements regarding Belgium and the Scheldt which the Four Powers made with each other in 1831, when they created the kingdom of Belgium that she is bound by some nebulous doctrine to refrain from doing anything which might conceivably hamper them in their future protective tenderness towards their Orion-child. But each one of these three gentlemen is an eminent Belgian!

The Dutch jurist, Den Beer Poortugael, brushes away

the flimsy contention, and lays down the sound principle, and the only safe one, that nothing that the Four Powers did can affect Holland, save in so far as she expressly agreed to it. An undefined quadruple supremacy over the Scheldt would be a monstrosity which fortunately does not exist.

\* A more important question is whether, assuming the forts to be built, they could be used in order to deny a passage to troops coming to maintain the neutrality of Belgium. Holland does not claim to be able to do this in time of peace. In war, the usual theory of the right of a neutral to refuse passage to warlike expeditions would seem to justify her in closing the Scheldt. Many authors question whether a nation can ever concede, even expressly, to another, liberty to use its territory or waters for the purpose of attacking another. Much less can it be obliged by an implicit understanding of a nebulous and uncertain character to do so. True, an onslaught upon Belgium would be an international wrong. But if Holland desired to resent it as such, it must be by war, or by steps which would inevitably involve her in war. There is no obligation upon her to act as policeman, to pronounce judgment upon the wrong-doer and to allow his enemies the hospitality of her waters.

It is impossible to suggest that Holland has expressly bound herself to permit the transit of warships along the Scheldt. The interminable correspondence at the time of the separation of Belgium (see Brit. State Papers, Vol. XIX, p. 54 *et passim*) is directed to the securing for Belgium of commercial advantages, and commercial advantages only. The definitive treaty with Holland (which was not signed until 1839)<sup>1</sup> merely applies to the Scheldt the general prin-

<sup>1</sup> Brit. S. P., XXVII. p. 990.

ciples of the Treaty of Vienna (Arts. CVIII *et seq.*) of 1814. These are limited to a grant of free transit "*sous le rapport du commerce*", and while the Belgian war was going on, the right of Holland to close the Scheldt entirely was practically admitted. Consequently, the Belgian advocates are forced to rely on the shadowy assertion that Holland is bound in some unknown way to make things smooth for the powers which undertook the protection of Belgium.

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It is well known that the Dutch king only yielded in the very last resort to the creation of Belgium, and that, largely because he was left with the control of the Scheldt. Imagine his astonishment if he had learnt that he was never to fortify it! The *Times*' correspondent, who advocates with so engaging an air "Dutch-Belgian" solidarity, might have reminded his readers that, but for Belgium and her backers of 1830, the Low Countries would have formed one kingdom to-day.

It is to be regretted that the campaign against the Dutch defences was initiated. Suspensions often produce realities. The effect of the imputations may be to bring about the Netherlands-German combination, which is so greatly to be deprecated.

TH. B.

#### VIII.—NOTES ON RECENT CASES (ENGLISH).

**BATH** v. *Standard I and Company Limited* (L. R. [1910], 2 Ch. 401), is an excellent application of the excellent rule that a person in a fiduciary position is not, without the consent of his *cestui que trust* or principal, allowed to make profit out of his trust. Here the defendant company had advanced certain goods to the plaintiff. The security for the loan was land in the home counties, and the company received powers to manage and develop this,

for which it was to receive remuneration, and in addition it could expend part of the income for certain purposes, and sell the land in parcels from time to time, and out of the proceeds to repay the loan. The articles of the company expressly permitted the directors to make personal profit out of the company's transactions. The company appointed several of its directors to transact business in connection with the land, for which it was entitled to expend income, and it allowed them remuneration out of the income for their services. The plaintiff must be taken to have known of the company's articles, and he seems to have also known of the payments made to the directors out of the income, but he never expressly agreed to such payments or accepted the accounts submitted to him. Held, that the payments deducted in the accounts could not be allowed. For the company it was argued that the company was in a fiduciary position to the plaintiff and the directors to the company, but that there was no such relation between the directors and the plaintiff. The Court following *Kavanagh v. Working-man's Benefit Society* ([1896] 1 Ir. R. 56), declined to adopt this view. It seems a trifle thin to argue that the agents through whom a trustee must act are not themselves subject to the same rules as their principals.

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It has often been pointed out in these pages that though technically questions of interpretation of documents are questions of law, in reality they are more often questions of fact. This is neatly brought out in *In re Barrance, Barrance v. Ellis* (L. R. [1910], 2 Ch. 419). There the point before Parker, J., was whether a certain writing, executed as a will, consisting simply of a list of names with sums of money placed after them, without any words of gift, was or was not sufficient to constitute a good disposition of the sums of money to the persons named. His

lordship held that this was concluded by the grant of probate of the writing. If the writing was, in fact, testamentary, it could not be doubted what the intention was.

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Two other cases in connection with wills are worth noticing. The first is *In re Evans and Bettell's Contract*, (L. R. [1910], 2 Ch. 438). There, a testator, by his will, charged the legacies and annuities on his residuary real and personal estate, which was to be converted. By a family arrangement, it was agreed that the realty should be divided between the two sons. In an originating summons, intituled in the matters of the will and arrangement deed, the Court ordered two sums of Consols to be paid into Court to meet the legacies and annuities, and that the rest of the estate be distributed. One son, afterwards, contracted to sell his share of the realty, but the purchaser objected to the title on the ground that it was still liable for the annuities and legacies, if the sums paid into Court should prove insufficient. Held, that the objection was good, and that the only way the land could be freed from liability was by an order under sect. 5 of the Conveyancing Act 1881. The other is *In re Williams' Settled Estates* (L. R. [1910], 2 Ch. 480), where an unusual application was made for compensation out of the Consolidated Fund, for funds wrongly paid out of Court in accordance with an order based on a mistake of fact. The application was refused. In both cases the principle is the same. The order of the Court in purely administrative matters, whether right or wrong, justifies the trustee, executor, or paymaster-general, as the case may be, in acting in accordance with it, and it does no more: all the legal rights are left as they were.

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Swinfen Eady, J., is so excellent and learned a judge, that one feels reluctant to doubt any decision of his, but it is to be hoped that, whether his decision in *Neale v.*

*City of Birmingham Tramways Company* (L. R. [1910], 2 Ch. 464), is good law or not, it will not be generally acted on. The defendant company is a very prosperous institution, so that, besides paying its ordinary shareholders dividends of 10 per cent., it has accumulated large sums in undivided profits. Its ordinary £5 shares consist of 6,047 fully paid up (issued to an old company whose business was taken over), and 53,953 paid up to the amount only of £1 each, belonging to the British Electric Supply Company. It occurred to the latter that it would be good business to turn all the ordinary shares into £1 paid up, by paying off the fully paid-up shares to the extent of £4 each out of the undivided profits. His lordship held, that under sect. 40, sub-sect. 1 of the Companies (Consolidation) Act 1908, they were entitled to do so. To us it seems more natural to construe that section as meaning, that undivided profits may be used to pay back capital *pro rata*, and it certainly seems more just. If the company had been paying one per cent. dividends there would have been no attempt to relieve the fully paid shareholders of their loss of capital.

*British South Africa Company v. De Beers Consolidated Mines, Limited* (L. R. [1910], 2 Ch. 502), is a remarkable example of the extension of jurisdiction conferred upon the Court by the Chancery doctrine that equity acts *in personam*. There the plaintiff company was English, and the defendant company, though registered in the Transvaal, had an office in London. They entered into an agreement, which the Court held was an English contract, by which the defendants granted a loan to the plaintiffs on the security of a mortgage of their lands in Africa, and as a collateral advantage they were to have a perpetual first right to lease all diamondiferous lands discovered in the plaintiff's African lands. Clearly this collateral advantage, since it was not to determine on redemption of the mortgage, was a clog on

redemption if the mortgage had been on English land. But the mortgage was on African land, and by the *lex situs* it was good. The plaintiffs, however, contended, on the principle of *Lord Cranstoun v. Johnston* (3 Ves. 170), that the contract being English created an equity which could be enforced here between the parties independent of the *lex situs*, and that equity must be governed by English law. And so the Court of Appeal held, affirming the judgment of Swinfen Eady, J., in the Court below.

In *Willmott v. London Road Car Company, Limited* (L. R. [1910], 2 Ch. 525), the Court of Appeal decides that a limited company may be "a respectable and responsible person" within a condition against assigning in a lease. This is contrary to the decision of Romer, J., in *Harrison, Ames & Co. v. Barrow-in-Furness* (63 L. T. 834), but, in view of the words of the Master of the Rolls (at p. 532), cannot be taken as holding that "person" is henceforth always in such cases to be construed to include corporations. The nature and object of the lease may, it is submitted, make it obvious that the word "person" is intended merely to mean "individual." At the same time, where this is the intention, draftsmen should henceforth say "individual."

J. A. S.

There is nothing ostentatious about a money-lender during business hours. He evades the personal distinction of being head of a great enterprise, with a humbleness surprising in a practiser of high finance. And though the Act of 1900 proposed to raise him to the prominence he deserved, he frequently declined to quit his seclusion, and veiled his business talents under somebody else's name. But *Whiteman v. Sadler* (L. R. [1910], A. C. 514), will work a revolution in his habits. The Money-lenders Act requires him to register himself "under his own or his usual trade

name." And the decision of the House of Lords holds, as that of the Court of Appeal did, that a name assumed for the first time for the purpose of registration is not a "usual" trade name. It must, therefore, follow that persons who have registered themselves in this way are not registered at all. The Act also restrains him from carrying on his business in any other than his registered name or under any other description. From this it follows that he is precluded from the usual method of indicating continuity in his business when he parts with it. The Act further restrains him from carrying on his business in more than one name. He is, therefore, not at liberty to pursue one money-lending business as an individual and another as a partner. As regards firms, the House of Lords decides that the names of individual partners should be indicated, and rejects the idea of inconvenience, as money-lenders "mostly hunt in couples, not in packs." So far the House of Lords has gone, but it has refrained from enforcing that part of the Act which forbids a money-lender entering into an agreement with respect to the advance and repayment of money, or from taking any security for money otherwise than in his registered name; for, as the House had just decided that certain money-lenders were not registered at all, it would have followed that their securities were void. But, the reason for this mercy was, that the Commissioners of Inland Revenue are to blame for entering on the register names just assumed for the purpose. The authorities are at present engaged in considering new regulations; but, up to the time of going to press, no further statement was ready for issue.

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The Statute of Frauds has suffered dire mutilation in the course of its long life, but yet the fragment that survives retains its old vitality nearly undiminished. Though section 17 was torn from it and appropriated by the Sale of



Goods Act, the clause in sect. 4 in the ancient Act, which stays enforcement of an unsigned contract not to be performed within a year, still keeps its grip upon those for the sale of goods, notwithstanding that part of the goods may have been accepted and received, or that the other conditions of sect. 4 of the Act of 1893 have been observed, and notwithstanding that the disjunctive particle is used in the section. Such is the decision in *Prested Miners Co. v. Garner* (L. R. [1910], 2 K. B. 776). It is a striking testimony to the repute of Mr. Leake's great treatise, and of *Smith's Leading Cases* (so long edited by Lord Collins when he was at the Bar), that Walton, J., supported his judgment on the authority of those classical works.

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The decisions on the Workmen's Compensation Acts are so numerous, and generally upon such minute points, as to be valuable only when digested and collected in a volume. But one or two in the recent reports are sufficiently exceptional to justify special remark. For instance, *Baker v. Jewell* (L. R. [1910], 2 K. B. 673), deals with a point which does not seem to have come previously before the High Court, by deciding that the function of an arbitrator is to fix the weekly payments according to the injured workman's physical condition at the time of the settlement, and not to project his mind into the future, and say that at the end of a fixed period the award shall be automatically varied. This is a curtailment of a power which arbitrators have sometimes assumed. There is a Scotch case, *Allan v. Thomas Spewart & Co.* ([1906], 43 Sc. L. R. 599), with which this decision is in accord. •

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*Eke v. Hart Dyke* (L. R. [1910], 2 K. B. 677), is of less importance as a precedent, inasmuch as earlier cases have decided, as this does, that an obscure but fatal disease about

which the attendant doctors have differed, and of which the cause and the date of inception were not less obscure, does not, if unaccompanied by any occurrence which could be called an accident, come within the Act. Another point is, that though no notice of the claim was given to the employer till it was much too late to have a post-mortem to decide what was obscure, the delay was protected by the proviso to sect. 2 of the Act. And the final point is, that the schedule of diseases under sect. 8 of the Act of 1906, which are to be treated as if they had been personal injuries by accident, is exclusive of all others.

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Another case is *Moore v. Manchester Liners* (L. R. [1910], A. C. 498), which is an appeal from that noted in our issue for May, 1909, Vol. XXXIV, No. 352, in which Moulton, L.J., who differed from his colleagues, hoped that the question might, owing to the contradictory decisions, be reviewed by a higher authority. His desire has been gratified, and the House of Lords have confirmed his judgment. But unfortunately there is again a want of unanimity, for, though the Lord Chancellor and Lords Ashbourne and James of Hereford sustain Lord Justice Moulton's view, Lords Macnaghten and Mersey agree with Cozens-Hardy, M.R., and Farwell, L.J., in the Court below. As there have been many contradictory decisions on the point involved in this and cases like it, and not unfrequent divergences amongst members of the Court giving the decisions, it may be accepted as a satisfactory event that a definite guiding pronouncement has at last been made: that "an accident befalls a man in the course of his employment, if it occurs while he is doing what a man so employed may reasonably do within a time during which he is so employed, and at a place where he may reasonably be during that time to do that thing." The concrete case which Moulton, J., put in the Court of Appeal was that,

if it is open to a miner to dine in a quarry or to go home to dinner, an accident in going or coming to his dinner would arise in course of his employment." The case of *Gilbert v. Owners of Steam trawler Nyzam* (L. R. [1910], 2 K. B. 555), is worth referring to in contrast.

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A convicted prisoner, well instructed in the chances and changes of his profession, has, of course, long ago learned that he need not abandon all hope when he enters gaol; and if he has the good fortune to be tried by a judge who though not unreasonably yet wrongly admits evidence, the Court of Criminal Appeal will very likely restore him to his desolated hearth. This has been proved many times over, but *Rex v. Ellis* (L. R. [1910], 2 K. B. 746), resuggests it. It was not an easy case, as the Court acknowledged. Indeed, the question where evidence can properly be admitted of previous misdoings by the accused, which have been judicially noticed, is often difficult to decide. Of course, the Criminal Evidence Act, in the first portion of sect. 1 (f), is clear enough, that a person charged and called as a witness shall not be asked questions tending to show that he has been charged with any other offence. The difficulty would arise in dealing with the exception in sub-division (1), which, as the Lord Chief Justice expressed it in *Rex v. Bond* (L. R. [1906], 2 K. B. 389), is, unless the acts sought to be proved from the past case are so connected with the offence under consideration as to form part of the evidence on which it is to be proved. This does not go quite far enough. But a supplement is supplied in *Rex v. Fisher* (L. R. [1910], 1 K. B. 149), where Channell, J., said that, if the frauds are of a similar character showing a systematic course of swindling by the same method, then evidence of a previous charge would be admissible. Probably, as the decision appealed against in *Rex v. Ellis* was on a charge of obtaining money by putting an inflated price on articles of china

which the prisoner was employed to buy on commission, the judge who tried the case considered, not unreasonably, though the method slightly differed, that such a systematic course of swindling was displayed by evidence in a case, not before him, in which the same accused had sold to the same victim certain pieces of china on the misrepresentation that they were well-known pieces of old Dresden. But the unanimous decision of five judges pronounces that the evidence was wrongly admitted.

What was the meaning intended by that part of the form of a bill of sale set out in the Schedule to the Bills of Sale Act 1882, which expresses the obligation of the grantor to pay principal and interest? Sect. 9 of the Act, which is the sanction of the form, seems to owe its existence to a special circumstance, for when the Bill left the Commons the section was not in it, but appears to have been inserted by the Select Committee of the House of Lords, after evidence given, and to have been, with the form, added to the Act on the motion of the Lord Chancellor. The form therefore must have had a definite meaning in the minds of those responsible for it, but in practice uncertainty of this meaning has made it the subject of judicial decisions on several occasions. The most recent case is *Rosefield v. Provincial Union Bank* (L. R. [1910], 2 K. B. 781), in which the prescribed form as to the grantor's obligation was closely followed. And it runs to the effect that the grantor agrees to pay to the grantee the principal sum, "together with the interest then due," by equal payments on certain dates. Two readings of this obtrude themselves at once, and both supported by decisions. First, that the equal payments are to be wholly applied to reduction of principal, and are to be accompanied by a further sum for the interest then due. Second, that the equal payments are to include principal and interest both. In either alternative a

calculation of the interest would have to be made with every payment ; and in the latter, a calculation of somewhat increased difficulty. But the latter is the proper meaning according to the decision of the Court of Appeal, though mainly on the ground<sup>1</sup> that previous decisions to the same effect are probably the basis of bills of sale executed daily.

It is a curious circumstance that, in one of the cases (*Linfoot v. Pockett* (L. R. [1905], 2 Ch. 835)) cited in the above, a decision of Fry, L.J., was completely mistaken by Lindley, L.J., who said, "construe this document as Fry, L.J., did in the case of *Goldstrom v. Tallerman* (L. R., 18 Q. B. D. 1), and read it as a contract to pay the principal and interest by equal instalments, each composed of the interest then due and a part of the principal." But Fry, L.J., said exactly the contrary, for he held that the meaning of the grantor's obligation clause in the prescribed form was expressed by reading it as if it stood, that the grantor would pay the principal sum named by equal instalments, "together with the interest due at the respective times of payment of the instalments of the principal."

Considering the length to which reports necessarily run, economy of space is of importance. It may be pointed out that in one of the cases noted above, quotations extending to forty-four lines on the first judgment are repeated verbatim in a subsequent one. About a page and a-quarter therefore might have been saved by a reference.

T. J. B.

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### SCOTCH CASES.

Sect. 70 of the Railway Clauses Consolidation (Scotland) Act 1845, which is the same as sect. 77 of the corresponding English Act, deals with the rights of railway companies to minerals under lands purchased by them. It will be recol-

lected that the effect of the section is that a railway company shall not be entitled to minerals unless they have expressly purchased them, and in the absence of express purchase minerals are deemed to be excepted out of conveyances of land purchased by railway companies. The question arises, What constitutes "a mineral" so as to require express inclusion in a conveyance? The leading case of *The Magistrates of Glasgow v. Farie* (15 R. House of Lords 94), containing the judgment of Lord Watson, decided that the word "mineral," as used in sect. 70, is not to be interpreted in the same way as it would be interpreted in an ordinary conveyance or lease, but that regard must be had to the relative position of the parties interested, and to the substance of the transaction. Since *Farie's Case*, there have been two very important decisions, the *Great Western Railway Co. v. Carpalla United China Clay Co.* (L. R. [1910], A. C. 83) and the *North British Railway Co. v. Budhill Coal and Sandstone Co. and others* (L. R. [1910], A. C. 116). And now the effect of these recent decisions has been considered by the First Division in *The Caledonian Railway Co. v. Glenboig Union Fireclay Co. Ltd.* (47 S. L. R. 823), in which the Lord President said that the cases mentioned in result established three propositions: (1) Each case is a question of fact and must be decided on its own circumstances; (2) whether a particular substance is a mineral or not must be considered in the light of whether at the date of the conveyance that substance was described as a mineral in the vernacular of the mining world, the commercial world, and landowners; (3) nevertheless, inasmuch as the words to be interpreted are those which define the exception to a grant, they must not, whatever their meaning in such vernacular, be so applied as to make the exception swallow up the grant, which would be the case if the substance in question forming the ordinary subsoil of the district were held to be a mineral and within the exception.

*The Tebrau Rubber Syndicate, Lim. v. Farmer* (47 S. L. R. 816) brings up the whole question of the relation of certain limited companies to income tax. Of course, where a company's business is to make profit by the purchase and sale of investments, the profits of any particular year thus made are assessable for income tax, no matter how the company chooses to treat these profits in its books. But when the sale of a company's assets is only one among several of its objects, how is a profit on such a sale to be treated? In the case mentioned, a rubber syndicate included in its objects (A) the acquisition and development of rubber estates, and the cultivation and manufacture of rubber; and (B) the sale of the whole or any part of the business or property of the Company. It expended £29,500 in the purchase and development of estates, but finding its capital insufficient to develop the estates till they reached the producing stage, it sold its whole undertaking to a new company at the price of £38,500. The Revenue claimed the £9,000 of difference as taxable, basing their contention chiefly on the decision in *The Californian Copper Syndicate* (6 F. 804), where the facts were similar. In that case, Lord Trayner concisely stated the principle of the decision: "I am satisfied that the appellant company was formed in order to acquire certain mineral fields or workings, not to work the same themselves, but solely with the view and purpose of reselling the same at a profit." Could the same be said of the Tebrau Syndicate? The Court considered the cases to be distinguishable, and held that the £9,000 was not liable to tax, for although from the name of the Company one might have a certain amount of suspicion that the real object of the Company, whatever the ostensible object, was merely to make the estate and turn it over at a profit to another company, yet the prospectus was drawn in such terms as not to justify this conclusion without something more, because these terms were consistent with the Com-

pany commencing life as an ordinary rubber-producing Company, which was precisely what it had done. Both the prospectus and the history of the Company, short as it was, were, in fact, materially different from those of the *Californian Copper Syndicate*.

• Two decisions on the Children Act 1908 may be noticed. Sect. 15 of that Statute provides that any person in charge of a child under the age of seven years, who allows the child to be in any room containing an open fire not sufficiently protected to guard against the risk of the child being burned or scalded, without taking reasonable precaution against that risk, and by reason thereof the child is killed or injured, is liable to a penalty. In a case brought by the authorities under this section (*Renton v. Ramage*, 47 S. L. R. 769), it was argued that the complaint was not relevant, because it did not specify the particular precautions which were wanting and which the accused should have taken, but the Court did not entertain this objection, for the reason that the words of the Statute did not indicate any mode of precaution neglect of which would involve a penalty, and that it was rather for the accused to put these precautions forward in her defence, than for the prosecutor to anticipate them in the charge. The other case is of more general interest, inasmuch as it deals with the important sect. 7, which enacts that a person who undertakes the nursing and maintenance of an infant under seven years of age for reward, shall be deemed to have no interest in the life of the child, and if such person directly or indirectly insures or attempts to insure the life of such infant he shall be guilty of an offence. It was held (*Glasgow Parish Council v. Martins*, 47 S. L. R. 733), that it was not a contravention of the Statute for a person who had undertaken the care of an infant and insured its life prior to the commencement of the Act to continue, after the Act came into force, to pay the premiums due under the policy.



Where a bequest by a testator is of a nature so circumscribed as to result in practical futility, the Court will interfere to authorise an extension, provided such extension can fairly be regarded as in no way at variance with the wishes of the testator and in general harmony with the scheme of the settlement. In *Marjoribanks and others (Trustees of the Duart Bursary Fund) Petitioners*, 48 S. L. R. 14, a truster who died in 1895, by a settlement executed in 1893, directed his trustees to apply the annual proceeds of a certain sum as a bursary "to be conferred on one young man of merit, being a native of the parishes of C. or T., and to be tenable for three years," to enable the holder to attend the arts classes in any of the Scottish universities, with a view to taking his degree. In October, 1892, women were admitted to the arts degrees of the Scottish universities. In 1910 the trustees presented a petition to the Court craving power to extend the benefits of the trust to young women. They averred that in the fifteen years since the truster's death only three young men had been found eligible, and that in 1907, 1908 and 1909, no eligible candidate was found. It was held that in the circumstances there was not sufficient to justify the extension craved and the petition was dismissed.

D. M.

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### IRISH CASES.

There is very little modern authority as to the powers of the Crown in dealing with a Common-law chartered corporation, or as to the way in which changes in the constitution of such a corporation can be effected. Trinity College, Dublin, derives its foundation and structure from charters of Elizabeth and Charles I; and a recent movement from within the College in favour of a modification in its constitution has led to the interesting, though scarcely conclu-

sive, decision in *Gray v. Provost &c. Trinity College Dublin* ([1910], 1 Ir. R. 370). A majority of the existing corporation had resolved on applying for a King's Letter (or supplemental charter), which should *inter alia* alter the composition of the governing body by making it partly elective. To this the plaintiffs, a minority of the members of the corporation, objected, and in the present action sought to restrain the College from applying to the Crown for such a King's Letter. It was suggested that for so fundamental a change in the nature of the existing corporation the consent of all the existing members was requisite. All that the case seems to decide is that the Court would not restrain the mere application for a King's Letter, even without the minority's consent. In a general discussion of the matter, Ross, J., summarises the cases in which the Crown can recall the charter of a corporation which it has created. This may be done under a power specially reserved, or if the corporation is "practically moribund," or if the corporation consents. The last of these cases is the only one applicable to the position of Trinity College; and apparently the consent of a majority of the members will bind the whole corporation.

*Cavan County Council v. Kane* ([1910], 2 Ir. R. 644), is a useful case as to the power of a county council to proceed by ordinary action against the owner of a traction engine which damages the roads. It decides that where the excessive weight of such an engine causes substantial and abnormal damage to a public road which is adequate for ordinary traffic, the use of the engine amounts to a public nuisance, even though the construction of the engine complies with the Locomotive Acts 1861 and 1865. The liability of the county council and the district council to repair the road and to contribute the funds for its repairing constitute sufficient special damage to enable both to sue in an ordinary action.

The Bills of Exchange Act 1882, by sect. 9 (2), provides for what is to happen when, in a bill or note, the words and figures vary; where the sum payable is expressed in words and also in figures, then the words are to prevail. But in the extraordinary document sued on in *Heaney v. Addy* ([1910], 2 Ir. R. 688), and apparently intended as a promissory note, there was no sum payable expressed in words at all. There was a slip of paper bearing a sixpenny embossed stamp; there was "£50" in figures in the margin; in the body of the document it was said "four months after date we jointly and severally promise to pay"; and there were some signatures which by the aid of extrinsic evidence could be segregated into those of an intended payee and makers of the note. The problem for the Court was, whether this amounted to a promissory note for £50, or whether it was vitiated by the omission from the body of the note of any statement as to the amount. In support of the latter view, reliance was placed on a *dictum* of Bowen, L.J., in *Garrard v. Lewis* (10 Q. B. D. 30), to the effect that where there is "a marginal index" (*i. e.*, the figures), but "a blank left by the acceptor to be filled up with the dominant and all-important statement in the body of the bill defining the amount for which it is accepted, it is not a perfect bill till this dominant amount is filled in." In the present case, however, the Court held that the document was a valid promissory note, there being evidence that the parties regarded it as such, and a finding that it was given in payment of a debt of £50. This was not a "blank left by the acceptor"; the parties themselves, however inartistically, had made what they considered to be a perfect note. It was also suggested, in the course of the judgment, that the words of the Statute dealing with a case where the sum payable is expressed in words *and also* in figures, imply that an expression in one only of these ways would suffice.

*Rex (Martin) v. Mahony* ([1910], 2 Ir. R. 695), is an important case in Irish practice as to *certiorari*, in relation to a

conflict of decision between the former Exchequer Division and the King's Bench Division. When application is made to quash a conviction on the ground of insufficiency of evidence, can the Court examine the evidence given before the justices? In other words, as it was put by the Lord Chief Justice, does mere insufficiency of evidence to warrant a conviction or order destroy jurisdiction? The full Court of King's Bench Division has now answered this question in the negative; if the conviction is regular and follows the statutory form, it must stand.

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A person who had for some years practised dentistry without being registered, applied to a dental hospital to be admitted as a dental student. The governing body of the hospital passed a resolution in these terms: "that K cannot be accepted as a student at this hospital, the committee having a right by their bye-laws to refuse any student without assigning a reason." A copy of this resolution was sent by letter addressed to K., and in his absence was opened by an assistant. On these facts, the plaintiff, in *Keogh v. Dental Hospital* ([1910], 2 I. R. 577), brought an action for libel. There were obviously several difficulties in his way. The evidence of a publication by the defendants was of the slightest. The circumstances in which the resolution was passed strongly suggest a privileged occasion. The Court, however, did not need to consider seriously either of these matters. They held that the words were not libellous *per se*. Once more, as in *Capital and Counties Bank v. Henty* (7 A. C. 741) and *M'Cann v. Edinburgh Rope & Co.* (28 L. R. Ir. 24), the principle was applied, that where words are in their ordinary sense innocent, and there is no evidence to support an inuendo, the fact that a malicious or suspicious person might possibly understand them in an evil sense will not make them libellous.

## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER  
LENGTH IN SUBSEQUENT ISSUES.]

*Sea Law and Sea Power.* By T. GIBSON BOWLES. London :  
John Murray. 1910.

Mr. Bowles criticises with his accustomed incisive felicity of comment the still unratified Declaration of London. His point of view is that of the belligerent, and of the blue-water school of strategists. With Britain he thinks it must be all or nothing. Either she is omnipotent at sea, in which case she needs no artificial security for her commerce, and wants only full liberty to distress her enemy; or else she is ruined and done for, and there is no more to be said. Having thus ruled out the case in which Britain is temporarily a weak belligerent, Mr. Bowles has only to weigh the comparative importance of protecting British trade and British shipping from occasional loss in war-time, and of preserving the fullest possible right to belligerent British cruisers of attacking enemy commerce as a means of victory. The discussion of this problem is marked by much ability and research. Short of the absolute immunity of the enemy's goods at sea, the Author considers British sea-power to be crippled to the maximum by the Declaration. Mr. Bowles' position is thus the opposite of that taken up by Mr. Leverton Harris, Sir J. Macdonell and others, who consider the Declaration dangerous for the neutral. It may be that their divergent views can be reconciled by the explanation that it is bad for an island Power, whether belligerent or neutral; and that its many ambiguities and uncertainties can always be interpreted against Great Britain by the curious Court which is to be set up to decide prize appeals. Every student of large problems of belligerent strategy will find much valuable material in the treatise before us, though it shows some signs of rapidity in composition. It is not usually thought that Britain is bound towards neutrals by the Declaration of Paris in a war to which a non-signatory Power is a party (p. 71). The present penalty of contraband carriage is not normally confiscation (p. 173). Reflection would have shown that there was a single and very simple reason for the exclusion of Tibet, Muscat, Egypt, Monaco, and the German Kingdoms from the Hague Con-

ference. To rely on statistics of the effect of war on wheat prices at a period when most of our wheat was home-grown (as at p. 80) is fallacious. Mr. Bowles seems to believe that there exists a right known as that of "denunciation," enabling a nation to repudiate any treaty obligation which it does not like, by the simple process of saying so. It appears that this right cannot be exercised after the time for performance of the obligation has arrived. Why it should be impossible for a State to break its promise then, and quite proper for it to dispense itself from its obligations previously we really cannot say. It would be a sad thing if no nation could make a promise without a tacit clause—"but this undertaking to be binding no longer than is agreeable." Treaties do get broken: but that does not show that it is lawful to break them. This wide-spread impression that treaties can always be "denounced" is, of course, derived from the irrelevant fact that commercial treaties usually provide for their own denunciation after a fixed term. It is an impression which invites prompt and emphatic correction. We regret that the Author countenances the novel and un-English doctrine by which Chase departed from every principle of Stowell's, and struck at trade with a neutral port. But we sincerely congratulate him on condemning the cowardly practice of "pacific" blockade.

*Land Law and Registration of Title.* By EUSTACE J. HARVEY.  
London: Longmans, Green & Co. 1910.

It has always been a wonder, to anyone who has travelled in America and the Colonies, why in England we have retained a system of land transfer, archaic, cumbersome and complicated, even taking into account modern improvements. A perusal of Mr. Harvey's book shows how even he fails to appreciate the full significance of compulsory registration of title. In the Introduction he speaks of the State guaranteeing the title, and one sees this point of view running through the text. In countries having compulsory registration of title, there is no guarantee by the State, for the simple reason that the fact of registration is a man's title without which he can have none as against the world. The necessity of some guarantee against risk is recognised in America, where there exist Corporations which, for a small fee, examine and guarantee titles. It is impossible within the scope of a review to explain the South African system which is as near perfection as is possible, but it is sufficient to say that all clogs on a title have to be registered,

and if not registered, are of no avail against the world, however valid they may be *inter partes*. Further, it is astonishing how few cases there are in South Africa, comparatively speaking, with respect to disputes about who is the owner of land. Still Mr. Harvey's book will undoubtedly bring prominently to the public mind the fact that in regard to the transfer of land we are years behind very nearly every civilised country in the world, and in this respect the Old Country might well learn a useful lesson from her Colonies.

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*The Law relating to Assurance Companies.* By ERIC GORE-BROWNE, B.A. London: Jordan & Sons. 1910.

*The Assurance Companies Act 1909.* Annotated by J. H. WATTS. London: Stevens & Sons. 1910.

The Assurance Companies Act 1909 (9 Edw VII, c 49), which came into force on July 1st of this year, is the direct outcome of a Select Committee of the House of Lords appointed in 1906, and purports to protect the interests of English policy holders in foreign companies which carry on business in England. Further, it was sought to restrict the energies of small companies which carried on a speculative insurance business in this country. With regard to the first class of company, much criticism has been levelled at the provisions which render it necessary that twenty thousand pounds should in each case be deposited with the Paymaster-General as a kind of guarantee of good faith, as being in many cases quite inadequate. Furthermore, the Act in no way forces foreign companies carrying on business in this country to disclose their financial position for public information. Mr. Gore-Browne deals with the question of Assurance generally; and particular attention may be directed to that part of the book, from page 59 to page 73, which deals with Insurable Interest. The whole subject is dealt with in easy, readable style, a great advantage being that every reference to a section of the Act is printed in heavy black type. In Appendix A we have the whole Act printed *in extenso*, and Appendix B sets out the Order of the Board of Trade of June 6th, 1910, making rules and regulations and prescribing forms under the same Act. The book will undoubtedly prove most useful to those whose business lies in the fields of Assurance.

Perhaps the arrangement of his book adopted by Mr. Watts will have a slight advantage, inasmuch as one has the text of each

section set out with the notes and decisions applicable thereto. In Appendix B is given the Report of the Select Committee before mentioned, an item which shows the grave consideration given by the Members to this important subject.

Apart from these small differences, both books possess considerable merit, and display an amount of careful work and study which will render them acceptable to a wide circle of readers.

*Irish Forms and Precedents.* Edited by WILLIAM C. STUBBS, M.A., and J. SINCLAIR BAXTER, LL.B. Consulting Editor, JOHN H. EDGE, K.C. London: Butterworth & Co. 1910.

This is a supplementary volume to the *Encyclopædia of Forms and Precedents*. The great differences in the Land laws of England and Ireland not only deprive collections of English precedents of much of their value to an Irish lawyer, but create considerable dangers "which may be incurred by an English lawyer, though he may be an expert in English land laws and conveyancing, who advises on Irish titles or prepares Irish deeds without first becoming familiar with the complications of Irish Land Tenure, and with the preparation of instruments dealing with Irish Land." The greater part of the precedents given in this volume relate exclusively to the conveyance and management of Irish Land. Conspicuous among these are forms for use under the Land Purchase and Registration Acts, but there must also be noted Fee Farm Grants, the difference in agreements for leases and buildings, and the different powers given to agents. All these separate headings have carefully drawn introductions. Mr. Stubbs has done the greater part of the labour connected with this volume, but Mr. Baxter, who succeeded him as Editor, is solely responsible for the important dissertations on the Land Purchase Acts and the Town Tenants Act. Mr. Edge, on whose work on Leases the book is partly founded, has acted as general Editor, and has contributed an Introductory Chapter.

*The Annual County Courts Practice 1911.* 2 Vols. By His Honour Judge SMYLY, K.C., and W. J. BROOK. London: Sweet & Maxwell.

*The Yearly County Court Practice 1911.* 2 Vols. By His Honour Judge WOODFALL and S. H. TINDAL-ATKINSON. London: Butterworth & Co. 1911.

Efficiency is the badge of both these works. It could hardly be otherwise, when they have stood the test of years against that keenest



of all criticism—that which is applied by those who depend in actual practice upon the information which the volumes supply. Nothing short of constant and prolonged reference to the books, in daily Court work, would justify the assignment of pre-eminence to either; and even then it is doubtful whether such a quality could be discovered. As far as possible, the accuracy of both works has been tested in a variety of searches, on matters important and trifling, and in every such case the accuracy has been proved. The comprehensive Finance Act has cast new duties on the County Courts, and the Workmen's Compensation Act has vastly increased their work. It is a boon to the profession to possess such reliable guides as these.

**Third Edition.** *Elements of the Law of Contract.* By A. T. CARTER. London: Sweet & Maxwell. 1910.

Although it is only three years since the appearance of the second edition, a third edition of this excellent little book has been found necessary. We also learn that during that time Mr. Carter has ceased to be a Reader to the Inns of Court. Nevertheless he manages to preserve the characteristics of his book, which is intended to ground students in the elements of contract. We notice, in looking through the Table of Cases cited, that certain of their number are printed in italics, but no reason is given for so doing, so that we are unable to guess the why or the wherefore, unless it is intended to indicate the leading cases. The book has been brought thoroughly up to date. The chapter dealing with Capacity has been enlarged, owing principally to the Married Women's Property Act 1908 (8 Edw. VII, c. 27). In the same chapter such recent cases as *Bromley v. Smith* (L. R. [1909], 2 K. B. 235); dealing with Contracts by Infants, and *Masson, Zemplier & Co. v. De Pinis* (L. R. [1909], 2 K. B. 831), affecting married women are noticed. The Companies (Consolidation) Act 1908 (8 Edw. VII, c. 69) of course affects the law of contract, and this again has been incorporated into the text and into Appendix A. The note on the far-reaching case of *British Cash Conveyors v. Lawson Store Service* (L. R. [1908], 1 K. B. 1006) is particularly illuminating. These are some illustrations showing how carefully Mr. Carter has revised the present edition, maintaining its position as one of the best handbooks on the Elements of Contract that we have ever seen. If we might venture one criticism, it would be to advise the learned Author to be more careful in his proof reading, as we notice many typographical errors.

**Fourth Edition.** *Principles of International Law.* By T. J. LAWRENCE, M.A., LL.D. London: Macmillan & Co., 1910.

It is only fifteen years since Dr. T. J. Lawrence published the first edition of this book. Already a fourth edition has been called for; and the many striking events of the past decade have provided the Author with so much material that the issue is practically a new work. A little less is said in this edition about the nature of International law, a little more about its history: but after this introductory matter is passed, and especially when we read the Laws of War we find that the book has been in many parts re-written. Not only are recent events specifically dealt with, but they are not embedded like faults in the strata of the old work; the very texture of the latter has been rewoven so as to include them in an organic unity. Among the most valuable features of the new matter is a very judicial discussion of the problem of the exemption of private property from maritime capture, which the Author resolves in the affirmative. We are happy to see that Dr. Lawrence no longer affirms that "the great Republic of the New World stands out as a giant among pigmies." The startling growth of Argentina, and the brilliant diplomacy of the Brazilian statesman Ruy Barbosa, have made old formulas rusty. He still seems, however, to concede an authority to the United States which we do not believe they exercise in practice. Nor can we agree with him in ascribing a similar authoritative legal force to the decrees of the Great Powers in European and in general matters. That their wishes have upon occasion been yielded to proves nothing. What would prove their authority would be the existence of a universal sentiment recognising their right to dictate: and of this we see no trace. The exercise of their power has been spasmodic, rare, undefined. It has exhibited all the vague characteristics of moral influence. We cannot clothe caprice in the raiment of legality and consent to style it "law." Dr. Lawrence gracefully acknowledges in the Preface the assistance derived by him from the study of *The Hague Peace Conferences* by Dr. Pearce Higgins. It is satisfactory to note that he disagrees entirely with those who argue that Article 50 of the Hague Convention of 1899 has no effective force, and can be disregarded by a commander who chooses to call his vicarious cruelties "reprisals." Signs of penetration by French thought may be seen in the use of the word "precious" for "valuable" or "important" (p. 273). But it would be pedantry to insist on trivial details, when the work as a whole is so

good and useful. It has taken its place as a standard authority, and can be unreservedly recommended.

**Fifth Edition.**—*The Law relating to Municipal Corporations.* By W. W. MACKENZIE, M.A., and G. R. HILL, M.A., assisted by C. L. DES FORGES. London: Butterworth & Co. 1910.

The late Mr. T. J. Arnold, one of the Metropolitan Police Magistrates, was the original compiler of this treatise, and it is sixteen years since the last edition appeared. During that time, Sir S. G. Johnson, the well-known Town Clerk and Clerk of the Peace of the Town and County of Nottingham, who assisted in compiling the second, third and fourth editions, died. Fortunately that well-known writer, Mr. W. W. Mackenzie, who was joint editor of the fourth edition, is still able to act as senior editor, in conjunction with Messrs. Hill and des Forges. Although no statute of striking importance has been passed since the last edition appeared, nevertheless a mass of judicial decisions and minor enactments has accumulated. At the commencement we get an historical Table of Provisions contained in the Municipal Corporations Act 1882, which enables the reader to trace, through much legislation, the history of the various sections of that Act. Of course the *puce de résistance* is the Municipal Corporations Act 1882 (45 & 46 Vict., c. 50), the great Act consolidating the law affecting municipal corporations in England and Wales. This, with its 260 sections, schedules, forms, etc., occupies 279 pages. It is most carefully annotated, and each section is copiously noted, all the most recent judicial decisions being given. After several minor Acts, we get the Local Government Acts of 1888 (51 & 52 Vict., c. 41) and 1894 (56 & 57 Vict., c. 73). The Appendix is divided into eleven chapters, each one of which attacks some subject of superlative importance. For instance, Chapter I treats of the Conduct of Municipal Elections, and in Chapter II we have Corrupt and Illegal Practices at Municipal Elections, and Municipal Election Petitions. Again, such subjects as Registration, and the Police Acts, are dealt with, and the notes are brought thoroughly up to date. The amount of work involved is amply demonstrated by the fact that the illuminating Index alone occupies 136 pages, and that hardly a page too many in order to make it a true key to the text. The compilation of this monumental treatise demonstrates, on the part of the learned Editors, a desire not only to show their own

erudition, but a determination to make the book fit to carry on the traditions of the past, which traditions have made for it the position of being a standard text-book on the law of Municipal Corporations.

**Sixth Edition.** *The Students' Guide to the Law of Real and Personal Property and Conveyancing.* By CHARLES THWAITES.

**Eighth Edition.** *A Guide to Criminal Law and Procedure.* By the same Author. London: George Barber. 1910.

Both of these guides are so well known and have been so often reviewed in these pages that little need be said of these fresh editions. The first named consists of epitomes of some of the important statutes connected with the subject, and a number of test questions on general principles, and on the conveyancing guide prepared by the Author and Mr. Indermaur.

The second named, dealing with a subject much less complex than real and personal property, is more complete in itself, for it contains, in only two hundred pages, an excellent treatise on the elements of Criminal law, and a series of questions on the preceding text. As books for students with an anxious eye on examinations, these fulfil their purpose in an effectual and practical way.

**Sixth Edition.** *Taylor's Principles and Practice of Medical Jurisprudence* By F. J. SMITH, M.A., M.D. London: J. & A. Churchill. 1910.

Every year the output of legislation makes it more incumbent upon medical men to study Medical Jurisprudence. Of late years, the passing of the Children Act of 1909, the Poisons and Pharmacy Act 1908, the Education Act 1907, and the two Workmen's Compensation Acts, have thrown a great additional burden on their shoulders. *Taylor's Medical Jurisprudence* is well known throughout the English-speaking world, and was primarily intended to equip the medical man to sustain the ordeal of the witness-box with credit to himself. Proof of this lies in the fact that more than sixty pages of the work are given up to sage advice upon this subject. Originally published in 1843 by the late Dr. Taylor, acknowledged to be the most eminent English medical jurist and toxicologist of his time, as a "Manual," in course of time it has become the leading work on the whole subject of Medical Jurisprudence. Care has always been taken that each successive edition should be edited by someone whose name was a household word for knowledge and capacity.

The last edition of the *Manual* appeared in 1891, and the first edition of *Principles and Practice* had appeared in the meanwhile during the year 1865. For some years both the *Manual* and *Principles and Practice* were edited by Sir Thomas Stevenson, the well-known Home Office expert. In 1903 the present Editor was approached, and he has brought out the fifth and sixth editions. That he was well qualified to take up the task is demonstrated by the fact that he is Physician to and Lecturer on Medical Jurisprudence at the London Hospital and Medical Referee to the Home Office. It would be a work of superfluity to indicate the many excellencies of this monumental treatise, as they are so well known, so that it is sufficient to point out some of the innovations introduced into the present edition. The number of woodcuts has been reduced in order to make further room for additional letterpress. The two subjects of Lunacy and Criminal Aspects of Wounding have been compressed. As counterbalancing these omissions, large additions have been made to the discussion on the legal relationships of Anæsthesia. The part dealing with Life Assurance has been amplified, a fact rendered necessary by the Workmen's Compensation Act 1906 looming so large on the medical horizon. There is every probability of the study of forensic medicine being still further widened by reason of the increasing part now taken by the State in what used to be the private treatment of the poor. Coroner's law will probably be overhauled, and the law relating to deaths under Anæsthesia. The State is now taking a large share in the medical inspection of children during their infancy and education. These points show how wide the field of Medical Jurisprudence is growing, but one may rest assured that successive Editors of *Taylor's Medical Jurisprudence* will meet and cope with each emergency as it arises.

**Sixth Edition.** *Jarman on Wills*. By CHARLES SWIEI, LL.B., assisted by C. P. DANCK, M.A. London: Sweet & Maxwell, 1910.

A book, the size of *Jarman on Wills*, cannot blossom out into new editions very frequently, but a longer interval has taken place than is usual in bringing out new editions of standard works. The last edition was issued as long ago as 1893. The present Editor has taken advantage of his opportunity to do more than merely bring the work up to date by the addition of new cases and new Statutes; he has made considerable alterations and additions by introducing some

important topics connected with Wills of personalty which were not included in Mr. Jarman's scheme of arrangement. The result is, that new chapters have been added on Legacies, Annuities, Ademption and Satisfaction, Absolute Interests in Personalty, Life Estates and Interests, Gifts by Reference, Alternative and Substitutional Gifts, and Trusts. New sections have been added to many other chapters. Other chapters have been re-arranged and some have been abridged. The difficult and disputed question of the rule against Perpetuities has been examined with particular attention, and a strong argument is directed against Mr. Lewis's view, that Contingent Remainders are subject to the modern rule against Perpetuities. Another thing to be noticed is the criticism of the doctrine of domicile in connection with the rules governing testate and intestate succession, which the Editor attributes to the fact that our judges did not fully grasp the technical meaning of *domicilium* in Roman law. A number of cases are commented on adversely, some of them pretty modern, though perhaps the extreme recency of *In re Waterhouse*, *In re Rolt*, and *In re Lane*, has softened the comment to the remark that "it would not be respectful to question the accuracy of these decisions, but they certainly defeated the intention of the donor of the power in each case." The two volumes contain 2,400 pages of text and Index; the Table of Cases fills 270 pages, and there are eight pages of Addenda. Jarman has long been the standard work on Wills, and the manner in which the present edition is edited gives good hope of its retaining its pre-eminence.

**Sixth Edition.** *Marsden's Collisions at Sea.* By E. S. ROSCOE and H. M. ROBERTSON. London: Stevens & Sons. 1910.

Mr. Marsden's treatise on the law of Collisions at Sea is a standard work on the subject, and in entrusting the compilation of the present edition to Messrs. Roscoe and Robertson a wise discrimination has been shown. The former of the two Editors is Admiralty Registrar of the High Court, and so is of necessity in close touch with all matters affecting the Law Maritime. There has been a complete revision and remodelling of the text which, together with the inclusion of all recent cases, brings the book entirely up to date. An important innovation lies in the omission of extracts from the Merchant Shipping Act 1894, and we are inclined to agree with the *dictum* of the learned Editors that the printing of extracts from a statute of this nature has a tendency to

mislead the reader, at any rate the balance of utility is on the side of the course which they have adopted. In Appendix III is printed a translation of the International Convention for the unification of certain rules of law in regard to collisions. Of course this convention has not the effect of a statute, but at any rate it demonstrates what is likely to be the trend of future legislation on the subject. In all other respects we find the book to be one meriting high praise, and the present edition is likely to maintain the position reached by former ones.

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**Ninth Edition.** *Oke's Magisterial Formulist.* By P. T. BAKER, M.A., with a section on Indictable Offences, by H. A. READ. London: Butterworth & Co. 1910.

There was urgent need for a new edition of this well-known collection of forms and precedents. It is quite indispensable to Magistrates, and others, for use in cases out of Quarter Sessions, and in Parochial matters. The last edition was published in 1901, and since then such important Statutes as the Licensing Acts 1902 and 1904, the Motor Act 1903, and the Children Act 1905, only to mention a few, have been passed. This required a thorough revision of old forms and the addition of many new ones. An important part of the work, namely, that which deals with Indictable Offences, has been entrusted to Mr. Henry Read. It could not have been put into more capable hands, and its accuracy can be absolutely relied upon.

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**Tenth Edition.** *Company Precedents.* Part II. Winding-up Forms and Practice. By Sir F. B. PALMER, assisted by EDWARD MANSON. London: Stevens & Sons. 1910.

**Third Edition.** *Principles of Company Law.* By A. F. TOPHAM, LL.M. London: Butterworth & Co. 1910.

Sir Francis Palmer has found it necessary to bring out a new edition of his well-known work on *Company Precedents*, by reason of the passing of the *Companies (Consolidation) Act 1908*. Part II, which deals with the Winding-up of Companies, has undergone considerable revision, in which Mr. Edward Manson has taken an important part. In an Introductory Chapter we have the question treated generally, together with a short account of "compulsory liquidation," voluntary winding up, and winding-up subject to the supervision of the Court, and all matters germane to these three

headings. "Compulsory liquidation" is fully and exhaustively treated in Section I from page 17 to 748, voluntary winding-up in Section II from page 749 to 840, and voluntary winding-up subject to supervision in Section III, from page 841 to page 886. Section IV comprises Arrangements, Compromises, and Reconstructions under the Act of 1908. Appendix (A) includes Statutes, (B) Rules and Orders, (C) Practice directions, (D) Miscellaneous matters, (E) Tables of corresponding sections and Rules. It will therefore be apparent that all requisite information is given with regard to this intricate subject, as one would expect in a work written by this famous Author.

Mr. Topham's little book on the *Principles of Company Law* is in the nature of a handbook, yet still it presents many attractive features. We expect that when it was written, the learned Author, who is one of the Readers to the Council of Legal Education, had very much in his mind's eye the requirements of students preparing for the Final Examination. We find him informing us, in lucid English, of the nature of a limited company, as contrasted with (I) Partnership; (II) Unincorporated Companies; (III) Incorporated Companies; (IV) Building Societies, etc.; (V) Other Companies under the Companies Act. There is unfolded before us the usual steps taken in the formation of a Company, together with a specimen form of Memorandum of Association which is terse and comprehensive. In various subsequent chapters, all the incidents attaching to the formation, carrying on, and the winding-up of a Company, are set out and explained. This excellent little work includes a full Index and Table of Cases, the latter of which gives in alphabetical order the names of both Plaintiff and Defendant under the letter of each.

**Twenty-fourth Edition.** *Archbold's Criminal Pleading, Evidence and Practice.* By W. F. CRAIES and H. D. ROOME. London: Sweet & Maxwell. 1910.

In the present edition the place of Mr. Guy Stephenson, who collaborated with Mr. Craies in the production of the last two editions, has been taken by Mr. Roome. Much important legislation has been passed since 1905, rendering the issue of a new edition imperative, and necessitating large additions and modifications. Perhaps the Statute that has affected the contents of this work most is the Criminal Appeal Act 1907, which has caused the re-



writing of the title on Criminal Appeal, and the leaving out of the sections on Writ of Error and Bill of Exceptions, whilst the greater part of that on New Trial has disappeared. The text of the Criminal Appeal Act 1907 and of the Rules and forms under it alone take up over forty pages. Among other Acts of the first importance which have had to be included and considered are the Prevention of Crime Act 1908, which deals with Borstal Treatment and preventive detention of habitual criminals, and the Probation of Offenders Act 1907, which deals with the same class of subject. The Children Act 1908 while re-enacting much of the old law makes many important changes; and the Incest Act 1908 is quite new. A large number of decisions have followed the passing of both the Criminal Appeal Act and the Prevention of Crime Act, and it has been necessary for the Editors to select and refer to the most important of these decisions. A large number of points were raised as to the practice in reference to the charge of being an habitual criminal, but most of them seem to have been decided by *R. v. Turner*. Besides including the new statutes and new cases, the whole of the work has been carefully revised. In some instances the arrangement has been altered, either by transferring a subject to another part, as in the case of the Vexatious Indictments Act 1859 and the Common law as to Accessories and Abettors, or by changes in the order of paragraphs. Many small additions have been made and some excisions, as in the case of the decisions as to probate, etc., granted by ecclesiastical courts which are suppressed on the ground that "they are of no present value." One small excision we should wish replaced, that is the proviso attached to the flogging of married women, "if she has separate estate not subject to restraint on anticipation." Some notes have been cancelled and some added; in some cases part of the text has been transformed into a note, and we think there are cases in which a note has been incorporated with the text. A large number of references have had to be revised, such as those to Local Prison Rules, Crown Office Rules, new editions of *Russell on Crimes*, *Roscoe on Evidence*, etc. In the last edition there were several clerical errors. These have, as far as we have noticed, been corrected, with the exception of the reference to *R. v. Boxall* on page 135, which is still cited as 5 A. & F. instead of 4 A. & E. We have even noticed a couple of new misprints. "Several witnesses were jointly indicted," is an obvious slip for "several prisoners, etc.," and in another place

"or" is put for "on." An Act not already mentioned, which has also caused a title to be re-written, is the Costs in Criminal Cases Act 1908. The book is now thoroughly up to date, and it is not likely that there will be so much new legislation as to call for another edition in the next five years.

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*Trichotomy in Roman Law.* By Professor GOUDY, D.C.L. Oxford: The Clarendon Press. 1910.—This is an expansion of one of the *Studi Fadda*, published in 1906, part of a *Festschrift* in honour of Professor Carlo Fadda, of Naples. The title in its legal aspect seems to be derived from Mitteis. The learned author, though perhaps at times a little fanciful, certainly makes out his case for the use of the sacred number three as the basis of division in Roman and mediæval writers, legal and lay, e.g., the triple division of the Digest. Strangely enough, he omits Dante with his three parts, his *terza rima*, and his concluding canto of the Paradise:—

*tre giri  
 Di tre colori e d'una continenza.*

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*The Law relating to the Rule of the Road at Sea.* By D. WRIGHT SMITH, M.A., B.L. Glasgow: James Brown & Son. 1910.—Although this handbook is intended for the use of mariners, at the same time it will be found to be of considerable use to lawyers. The Author is a Scottish solicitor presumably practising in Glasgow, and so would have considerable knowledge of his subject. He has also published a *Digest of Leading Cases on the Regulations for Preventing Collisions at Sea*, the two works forming part of a series entitled *Nautical Press*. The Author has treated a complex subject in a manner which will make it understandable to the layman with a technical nautical knowledge. Each article is printed at the commencement in leaded types, and then is given the gist of the interpretations thereon. Diagrams are inserted to illustrate the text, and in the Appendix we find extracts from all the Statutes germane to the subject. Speaking without technical knowledge of the subject, it would seem as if Mr. Wright Smith had written a handbook which will prove of great practical utility to that class of readers for which it is intended.

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*A Guide to the Duties imposed upon Land and Mineral Rights.* By WALTER P. BOAS. London: Stevens & Sons. 1910.—To the

numerous treatises planned to aid the bewildered landowner in his task of mastering the many dark passages of the Finance Act, this treatise is added. The Author wisely starts, not with sect. 1, but with sect. 25, which deals with the bases of the several valuations on which the burden of the new duties is to be borne; and his explanations are clear and helpful on all the sections included in Part I, and on those of Part III (*viz.*, sections 56, 93, 94 and 96), which are analogous to the first Part. The work will have a special interest for owners of land in Ireland, for in addition to a full consideration of the points affecting great Britain, the Author explains the effect of the new duties on land in the sister island.

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*Liquor Licence Duties, Death Duties, Income Tax, Stamps, Customs and Excise, under the Finance Act 1910.* By J. WYLIE. London. Jordan & Sons 1910.—This volume with the preceding one completes an examination of the Finance Act: and, though in Parts II to VIII, which are the ones treated of in the book, perplexities are not so abundant as in Part I, the help given by the Author will be of assistance to persons who need to comprehend the liquor licence and other duties and outlays upon which he comments. He gives a very good summary of the provisions of these parts of the Act, and goes through all the sections, to which he adds what appear to be valuable and perspicuous notes. Although the title is a very comprehensive one, the contents will probably fulfil the readers' expectations.

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*The Licensing (Consolidation) Act 1910.* By W. H. AGGS, M.A., LL.M. London: Sweet & Maxwell. 1911.—This production continues the useful series of "Annotated Acts." It gives a brief outline of the history of licensing law from 1828 to the present time, followed by the Act, fully annotated; and an Appendix contains the Rules and Regulations under the Act and a Schedule of Forms. A very good Index completes the work.

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**Seventh Edition.** *The Overseers' Handbook.* By W. W. MACKENZIE, M.A. London Butterworth & Co. 1910.—The present edition of the Overseers' Handbook has a considerable amount of new matter connected with what may be considered as "burning questions." As the subject of "rating" is certain to come into increased prominence, considerable attention has

been paid to it in more than one chapter, and the interest of the ratepayer and the local authorities have been alike considered. It must, however, be remembered that the subject of rating is only summarised, and that for fuller information on this difficult subject reference must be made to *Ryde on Rating* or some other like treatise. The duties of overseers are multifarious and often difficult, as will be seen by the Calendar at the beginning of this work, and some such guide as this is almost indispensable.

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## CONTEMPORARY FOREIGN LITERATURE.

*Prolegomènes à la Science du Droit.* By Professor HENRI ROLIN. Brussels, 1911.

An enquiry into the psychological element of law, in Criminal law the *mens rea*. Some time, says the Professor, we shall have a science of *sociologie juridique*, but at present it is in the making. At present jurists regard only the house, not the stones and the soil.

*Das Notariat in Russland.* By Dr. VLADIMIR PAPPAFAVA. Innsbruck, 1911.

A learned and—as far as an Englishman can judge—complete account of the office of notary in Russia. There are three kinds of notaries: notaries proper, old notaries, and bourse notaries, each class with its own duties and its own precedence. The table of precedence at p. 20 is a good illustration of the Russian official hierarchy. The notary ranks with the Kollegienassessor in the civil service, the major in the army, the captain-lieutenant in the navy. On p. 20 is a typical German juristic word, *Hypothekenbestellungsverträge*.

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*Das Urkund—und Beurkundungswesen in Montenegro.* By the same writer. Vienna, 1910.

In Montenegro there are no notaries but documents are authenticated by the Court. Dr. Pappafava gives a list of documents required to be so, mainly contracts and wills.

*Il Fenomeno della Guerra e l'Idea della Pace.* By Professor G. DEL VECCHIO. Sassari, 1909.

The inaugural address at the University of Sassari in 1909. The point of it is that the controversy between the *irenisti* and the *polemisti* has been going on since the classical period, and only quite lately have the former had their opportunity. The writer however, thinks that though peace is essential to justice, war has its uses as a school of patriotism and self-denial.

*Un Principio d'Equità, le Iniquità della sua Applicazione ed i suoi nuovi Atteggiamenti.* By Professor M. RICCA-BARBERIS. Urbino 1910.

The principle of equity attacked is that no one shall enrich himself at another's expense. According to the learned writer, the exceptions eat up the principle. But the arguments do not seem very convincing.

#### PERIODICALS.

*Journal du Droit International Privé.* Nos. VII—X. Paris, 1910.—An anonymous writer contributes a thoughtful article on aerial navigation in respect of the crossing of frontiers (p. 1124). A legacy to Mr. Hodgson Pratt, Secretary of "The International Arbitration and Peace Association" was held invalid by the Court of Cassation as being in contravention of Cod. Civ., s. 911 (p. 1144). The Tribunal Civil of Brussels held that an advocate could not claim for possible loss of clients by his having to take new chambers, his old ones having been expropriated by the State (p. 1277). In Brazil, if the succession of an alien remains unclaimed for thirty years, it passes to the State (p. 1295).

*Deutsche Juristen-Zeitung.* Berlin, 1910; 1 Oct.—15 Dec.—Dr. Zielke, after spending some time in the English Courts of law, is struck by the fairness of English judges (p. 1065). Dr. Bachrach has some observations on the Johann Orth case (p. 1210). The *Festnummer*, on the hundredth anniversary of the University of Berlin, shows a wonderful picture of legal progress. Probably no university in the world can show such a succession of names as Savigny, Eichhorn, Bethmann-Hollweg, Ihering, Keller, Bruns, Heffter, Gneist, Mommsen, Brunner, and Gierke.

*Blätter für vergleichende Rechtswissenschaft und Volkswirtschaftslehre.* Berlin, 1910; Nov. and Dec.—This periodical contains little of interest to English readers. On p. 157 is a report of a case in the Bombay High Court on the position of immovables in a foreign country.

*Zeitschrift für Internationales Recht.* Berlin, 1910; Vol. XX, Part 4.—The main contents are a sketch of the life-work of Friedrich von Martens (p. 343), a question of compensation to a foreigner's representative for death caused by a delict in the United States (p. 441), and the text of the North Atlantic Fisheries Award of 7 Sept., 1910.

*La Giustizia Penale.* Rome, 1910; 25 Aug.- 1 Dec.—Contrary to the English custom, an *avvocato laureato* (something like a King's Counsel) may defend a prisoner in any assize Court (p. 1072). It is no objection to the evidence of an expert that he has been sworn as an ordinary witness (p. 1075). The law against lotteries of 1908 is contravened by one person purchasing a lottery ticket from another, (p. 1083).

JAMES WILLIAMS.

## WORKS OF REFERENCE.

*The Lawyers' Remembrances and Pocket Book for 1911.* By A. POWELL, K.C. London: Butterworth & Co.—This handy little work appears to have been carefully revised and brought up to date. Some useful notes on the New Land Taxes are a special feature of the present issue.

*The Solicitors' and Law Clerks' Vade Mecum and Diary for 1911.* London: Sweet & Maxwell.—Contains a great deal of valuable information in a handy form. Several additions have been made to the present issue, notably, County Court Costs, High Court Time Table, and a Table of Distribution of Intestates' Estates. This little book should prove useful in a Solicitor's office.

*Fry's Royal Guide to the London Charities.* Edited by J. LANE. London: Chatto & Windus. 1911.—This useful guide embraces the whole of the charitable institutions in London. The main part consists of a list, in alphabetical order, giving the name and address of each charity, its objects, receipts, chief officials, etc.; and information is also given for the use of those wishing to avail themselves of the benefits of the charities, so that the book forms a reliable guide both to those who give and those who receive. We are sorry to note from the Editor's interesting review of 1910 that the past year has been a bad one for these deserving institutions.

*Sweet & Maxwell's Diary for 1911 for 1911* Edited by F. A. STRINGER and J. JOHNSON. —Considerable alterations have been rendered necessary in the present edition by the provisions of the Finance (1909-10) Act, and these appear to have been carefully and accurately made. Much new matter has been included, and the Diary in every way maintains the high standard of excellence reached by the previous issues. An extremely handy work of reference, it should find a place in every solicitor's office.

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Books received, reviews of which have been held over owing to want of space —Rouse's *Practical Man* Liversley and Cries' *Marriage Laws of the British Empire* Scrutton on *Charterparties* Morris' *The Frankpledge System* Scott's *The Visigothic Code*, Davidson's *Precedents of Conveyancing*, *The Charters of Southampton*, Vols I and II White and Tudor's *Leading Cases in Equity*, Vol I, Selden Society's *Publications*, Vol 24 Piggott's *Extradition—Fugitive Offenders* Butterworths *Workmen's Compensation Cases*, Vol III, Paterson's *Licensing Acts*, Montgomery and Woodcock's *Annual Licensing Practice*, Whitely's *Licensing Acts* Larnshaw's *Voluntary Liquidation* Jones' *The Solicitor's Clerk*, Part II Strachan's *Law of Trust Accounts*, Burge's *Colonial and Foreign Law* Vol III Renton and Phillimore *Comparative Law of Marriage and Divorce* Brown's *Legal Maxim* Butterworth's *Yearly Digest* 1910, Chambers' *Constitutional Law*, Parsons and Allen's *Workmen's Compensation Act 1906*, Knochers *Accidents in their Medico Legal Aspects*, Salmond's *Law of Torts* Smith's *Ecclasiastical Law*, Fisher on *Mortgages*, Halsbury's *Laws of England* Willis' *Workmen's Compensation Act 1906*, Bray's *Digest of Discovery*

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Other Publications received. Ilbert's *Government of India—Supplementary Chapter* Gates' *Divorce or Separation Which?* Matthews and Sykes's *Money Lenders Act 1900* Supplementary Notes, *The Hague Peace Conference 1899 and 1907*, and *Air Sovereignty* (Luzac & Co.), Shearwood's *Bar Examination Questions*, Vol I, Part I *The Cudator* (India)

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The *Law Magazine and Review* receives or exchanges with the following amongst other publications —*Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico Legal Journal*, *Indian Review*, *Kathiswar Law Reports*, *The Lawyer* (India), *South African Law Journal*

# THE LAW MAGAZINE AND REVIEW.

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No. CCCLX.—MAY, 1911.  
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## I.—EARLY LAW SCHOOLS IN LONDON.

WITH the survival of the Communal Courts, with the rise and development of the *curia regis* and its concentration at Westminster, and with the undoubted existence of a professional class of highly-skilled lawyers, the absence of schools of law in London in the twelfth and thirteenth centuries is inconceivable.

According to tradition, there was a legal institution in Dowgate, called Johnstone's Inn, another in Pewter Lane, and a third in Paternoster Row. We know that St. George's Inn in Seacole Lane was the parent of New Inn. There was the Cathedral School of St. Paul's, and in all probability there was a hostel of some sort in Cheapside attached to the St. Mary-le-bow, where the Archbishop of Canterbury held his Court of Arches.

At the time of the Conquest, almost every monastery possessed its legal adviser. Not every monk became a priest. It was customary, as Selden says, for practising lawyers to live in monasteries without taking orders; in the Abbey of Abingdon, for instance, resided three men renowned for their legal skill, Alfwin, Sacolus and Godric, described by Selden as "common lawyers."

The commissioners sent by William to supervise the administrations of justice in the counties numbered "men learned in the Saxon laws." To their ranks were now



added crowds of civilians and canonists who had been swarming across the Channel for the express purpose of practising and teaching law, and not merely for the benefices of dispossessed Saxons. To these men some knowledge of Saxon law and procedure became necessary.

Of these, Lanfranc was one of the most conspicuous. An Italian advocate before he became a priest, he had taught law at Avranches. Entering the monastery of Bec in Normandy, he became its prior about 1045, and here he again opened a school which soon became famous, scholars flocking to him from all quarters of Western Europe. Amongst his pupils were Anselm, his successor at Canterbury, Roger, afterwards prior of Bec, and Theobald, successively prior and abbot. In the famous suit before the county court between Lanfranc and the Governor of Bayeux, we find the Archbishop talking glibly of *sake and soke* and *flymena fyrmth*, *grithbreca* and *forsteal*, *hainsfore* and *infangtheof*, to the manner born.

And during the next reign the monopoly of the Church in the law had become even closer—so close in fact that according to William of Malmesbury it had passed into a proverb, "*Nullus clericus nisi causidicus*."

Above all things these men had brought with them the Civil law of Rome. Before the *Pandects* had been discovered at Amalfi in 1137, the Code, the *Novels* and the *Institutes* of Justinian had been expounded in the famous school of Irnerius at Bologna in the early years of the twelfth century, and indeed in France four copies of the *Pandects* themselves had been preserved, although they had disappeared before the siege of Amalfi. It was, however, the re-discovery of an authentic copy of the *Pandects* which gave new impetus to the study of the Civil law throughout Western Europe, and not least in England.

Perhaps the most important result of the discovery was the publication of the *Decretum* in 1151 by Gratian, a

Benedictine monk of Bologna. This was a digest of the Canon law after the model of the *Pandects*, but entirely wanting in the accuracy, clearness, and literary excellence of the latter. It was, in fact, a confused unmethodical compilation, full of inaccuracies and even forgeries. But in spite of these blemishes it was the work of a great lawyer. Calculated to promote the power of the Church, it was received by the clergy with such general approbation that its authority became permanent. It became the great code of Ecclesiastical law upon which the Papacy based its claim to universal dominion.

Drawn largely from the Civil law it was necessary for a clergyman, who desired to rise in the Church, to be a civilian as well as a canonist. Upon the publication of the *Decretum*, English scholars crowded to the lecturers in these laws in the city of Bologna.

Prior to this, however, Roger de Bec had lectured on the sister laws in the city. These lectures were prohibited by King Stephen, prompted, no doubt, by the same body of men who had wrung from Henry I the charter which recognised the old local courts in the city as legal institutions.

In 1138, Theobald, the pupil of Lanfranc at Bec, was elected Archbishop of Canterbury, where he attached to his household many young men of legal and political talent, and made his palace a training college "of a new generation of English scholars and statesmen."<sup>1</sup> Fortunately, in one of his letters, Peter of Blois, his secretary, has left a description. "In the house of my master, the Archbishop of Canterbury," he writes, "there are a set of very learned men expert in the rules of justice as well as other parts of prudence and knowledge. It is their constant custom after prayers, and before they dine, to exercise themselves in reading, in disputations, and in the discussion of legal causes. To us all the knotty questions of the kingdom are

<sup>1</sup> Norgate, *Angewin Kings*, I, 352.

referred, which being brought forth into the auditory, where all the company assembles, everyone according to his rank whets his understanding to speak well, without wrangling or obloquy and with all the acuteness and subtlety that is in him, declares what he thinks the most prudent and sound advice. And, if it pleases God, to reveal the best opinion to the lowest among us, the whole assembly agrees to it without envy or distraction."<sup>1</sup>

Amongst the persons to whom knotty questions were addressed were Roger of Pont l'Eveque, afterwards Archbishop of York, John Belmeis, afterwards Archbishop of Lyons, and Thomas à Becket. It is evident that Theobald carried on the traditions of Bec at Canterbury, and established here a school of law. About the year 1144 Theobald sent for Vacarius, the celebrated civilian of Mantua, who became the Archbishop's advocate, and no doubt lectured on law to the above-mentioned young men. And, as Selden says, just as Roger of Bec lectured here, so many other monks devoted themselves, not only to Civil law, but to the Common law, both in Court and in the schools outside as well as within the walls of the monasteries.

Master Giordano Fantasma, mentioned in *Anesty's Case*, one of the clerks of Henry of Blois, Bishop of Winchester, Theobald's rival, was himself engaged in litigation in 1160 with Master John Joichet, who, without his licence, had acted as rector of a school or college at Winchester. No doubt Henry of Blois had promoted similar establishments to that of Theobald's at Canterbury as a rival seminary for the study of the Civil and Canon law. Fantasma's monopoly in Winchester may readily be understood. The delegates gave sentence in his favour, and Joichet was enjoined to shut up his school on pain of excommunication.<sup>2</sup> Fantasma no doubt held the Bishop's licence, which Joichet lacked.

<sup>1</sup> Lytton, *Life of Henry II*, Vol. II, 261; Selden's *Plat.*

<sup>2</sup> John of Salisbury, Ep. XIX.

In spite of Stephen's prohibition, therefore, the study of the Civil law, to which was presently added that of the Canon law, was universally promoted by the Church. We shall see how the churchmen flocked to the University of Paris for this purpose. But although most lawyers were also civilians, they were not always canonists. Judges were still usually chosen from the clerical ranks, but although civilians and clerks, they were King's men first and always. Thomas à Becket was the exception. Having climbed into power as the King's man, he turned round and became the champion of the Canon law against Henry II. The struggle, as we shall see, produced the University of Oxford and the teaching there of the Civil law, but it also, we may rest assured, gave an impetus to the study of the Common law in the City of London. In Henry's reign, too, common pleas were as a matter of grace (and of course for a consideration) heard in the Court of Exchequer, which at any rate during its two financial sittings, if not throughout the year, sat in London. Whether the provision in Magna Charta was intended to deprive the Exchequer of this business or to afford relief to other less favoured litigants, in following the Court during the King's progress through the country, it undoubtedly had the effect of increasing legal business in London.

After his signature of the Great Charter, by which John unwittingly struck the second blow in the struggle between the Common law and the Church, "divers men learned in the law," says Coke, "that I may use the words of the record, kept schools of law in the City of London and taught such as resorted to them, the laws of the realm taking their foundation of *Magna Charta* and *Charta de Foresta*." This was precisely the method employed by the Readers to the Inns of Court when we first meet with them.

A churchman, and above all a tool of the Papal See,

Henry III, after he came of age, cancelled, in the eleventh year of his reign, both these charters. In 1234, Henry, by his writ, addressed to the Mayor and Sheriffs of the City, ordered "the suppression of the schools within the City of London";<sup>1</sup> but, says Coke, this writ took no better effect than it deserved, for evil counsel being removed from the King, in the following year he confirmed under the great seal *Magna Charta* and *Charta de Foresta*. Selden thought that the *leges* referred to in Henry's writ were the Civil law, and this is also the opinion of Pollock and Maitland. Dr. Stubbs thought they referred to the Canon law, but at this period Henry was under the influence of his Italian priests and was endeavouring to support the Church. If it is correct that civilian lawyers were still practising in the secular Courts and teaching Common law in the schools, Henry was killing two birds with one stone. Civilians had become almost as obnoxious to the extreme churchman as the common lawyers. This would agree with the suggestion of Pollock and Maitland, that Henry was protecting against competition the Oxford Law School which was entirely under the thumb of the Church. Coke evidently thought the term referred to the Common law and he had the record before him. *Leges* was never, so far as I am aware, used for the Civil law, but it does occur in legal documents at a later date for the Common law. It was probably intended here to cover both, Serjeants, with their groups of apprentices, must by this date have been long in existence, and if the prohibition did not include the teaching of the Common law, it is a little difficult to see why we should find all the law schools outside the city boundaries when we get our first glimpse of them, at the commencement of the fourteenth century. Of course, it is quite possible that their new habitat was solely due

<sup>1</sup> That no one should set up schools of the laws in the said city and teach the same there for the time to come.

to the increased business at Westminster, but it was more probably due to both these influences. Outside the city these schools would be free for the time from the restrictions of the writ, and at the same time more conveniently situated for attendance at Westminster Hall, and yet within easy reach of the Guildhall and other city Courts. And the prohibitions restraining the clergy from practising in secular Courts were part of the same policy. Since almost all lawyers were priests or clerks it was no doubt anticipated that their withdrawal would deprive the secular Courts of trained lawyers, weaken their authority and standing, and gradually throw all the business into the ecclesiastical Courts. And in 1164, Alexander III even prohibited clerks in Holy Orders from lecturing outside their monasteries on natural philosophy and municipal law. This prohibition was confirmed by Honorius III, but it was evidently found insufficient, for in 1217 we find Richard Poor, Bishop of Salisbury, giving the following advice to his clergy:—"*Nec advocati sint clerici vel sacerdotes in foro seculari, nisi vel proprias causas vel misirabilium personarum prosequantur.*"

This was followed up in 1287 by the Papal Legate Otho, proclaiming from his throne in St. Paul's the Constitutions, whereby he forbade any clergyman to appear as an advocate in a secular Court in a case of blood or in any other case whatsoever, except it was allowed by the Canon law. Clergymen were also warned not to accept judicial appointments. Both these prohibitions must have been largely disregarded. Five Canons of St. Paul's alone were justices at Westminster or in Eyre between the date of the Constitutions and the death of Henry III. "Albeit," says Coke, "divers judges of the realme were men of the church as Britton, Martin de Patteshull, William de Raleighe, Robert de Lexinton, Henricus de Stanton, and many others, and that the honourable officers of the realme as Lord

Chancellor, lord Treasurer, lord privi seal, Master of the Rolls etc. were in those days men of the Church, yet they had such honorable and true-hearted courage, as they suffered no encroachment by any foreign power upon the rights of the crowne or the laws and customs of the realme."

It was, as Coke infers, the political pretensions of the Papacy that these ecclesiastical lawyers resented. They became champions of the Common law not because they loved it more than the Civil law, but because they hated the Canon law as representing a foreign power. They did not become champions of the Common law in opposition to the Civil law as Pollock and Maitland suggest, nor in opposition to the Canon law. On the contrary, these men were deeply read in the Civil law, and they never hesitated to apply its principles in order to supply the deficiencies of the Common law. Our first great legal text book, written by or under the direction of Henry II's Justiciar, Glanville, took the *Pandects* as its model. It was steeped in Roman law. The Church, however, was not satisfied with a purely negative policy. It claimed not only exemption for the clergy from the authority of the secular Courts, but also exclusive jurisdiction over all matters savouring of spirituality.

Thus in 1258, Boniface, Archbishop of Salisbury, uncle of Queen Eleanor, published a constitution in which he encroached upon the jurisdiction of the Common law Courts, thundering out excommunication against the judges if they violated or failed to obey the "Constitution." "But notwithstanding the greatness of Bishop Boniface," observes Coke, "and that divers of the judges were of the clergy and all the great of the realm were prelates, yet the judges proceeded according to the laws of the realm and still kept, though with great difficulty, the ecclesiastical Courts within their just and proper limits."

In 1268 the Constitutions of Otho were confirmed by

the Legate, Cardinal Ottoman, with great pomp at St. Paul's.<sup>1</sup>

That this was part of a settled policy is also shown by the Bull of Innocent IV (probably spurious), who in 1254 had forbidden the teaching of the Common law by the clergy.

This attempt to degrade the status of the legal profession and to lower the standard of legal knowledge in order to retain the monopoly in the hands of the Church, nearly proved successful. It was successful in so far as it threw the profession open to practitioners who were both ignorant and unscrupulous. And the mischief did not stop at these persons, as the judicial scandals of 1289 proved. In the reform which followed, doubtless Edward I made some provision for legal instruction.

We may pause here to consider the nature of these schools of the law in the city. Like the Halls of Oxford and Cambridge, we should expect to find them children of the gild, and evidence is not wanting in the case of the Inns of Court and Chancery of such parentage. Founded for almost every purpose, civil and religious, these gild societies framed rules of government for the regulation of their respective objects; the protection of their members; the training and education of their novices and apprentices. It is in the constitution, therefore, of the Halls and Colleges of the English and foreign Universities that we shall find those characteristic features of the gild which will help us to understand the origin and growth of the analogous law schools in London.

The University of Oxford owed its origin to the famous struggle between Henry II and Becket. Up to this time, clerks and scholars had flocked to the University of Paris in crowds. By a provision in a series of royal ordinances directed against the partisans of Becket, it was decreed in 1167 that henceforth no clerk should cross from the

<sup>1</sup> Milman, *Latin Christ.*, Vol. II, 381.



Continent to England or from England to the Continent without the leave of the king or his justiciar, and that all who possessed "revenues" in England should return within three months "as they loved them." It is true that several not unimportant schools existed at Oxford before 1167. Theobald Stampensis, a "Doctor at Caen," sometime prior to 1117, transferred his school to Oxford, where he had under him "sixty or a hundred clerks, more or less." He was a theologian of liberal tendencies. Another master, also a theologian, Robert Pullus or Pullen, was teaching in 1133. Whether the celebrated jurist Vacarius taught at Oxford prior to 1167, is uncertain. He had undoubtedly lectured at Canterbury in the forties, but since his *Liber Pauperum* became the recognised text book in Civil law at Oxford before the end of the century, it is quite possible, as Gervase asserts, that he taught at Oxford before 1167 as well as after.

But a single school, however celebrated, does not constitute a University. Although there is no proof that the master and scholars expelled or recalled from Paris, came to Oxford in consequence of Henry's prohibition, it is certain that within a few years of that event a number of schools in more than one Faculty, taught by many masters and attended by a numerous body of scholars, some from distant countries, had come into existence.

What I desire to emphasise here is the practical independence of the masters. It is probable that "unless according to the custom of Paris he shall have been examined and approved" by the bishop or his representative, the master was not allowed to teach, but once he had obtained this licence he was free from further ecclesiastic control. Apparently at first the head of the master's gild was styled the "Rector." Later he became the "Chancellor," and though the bishop's officer, he was elected by the masters, and usually from their ranks. Without a cathedral—Oxford

was under the see of Lincoln—the chancellor, as he became more dependent upon the University, made himself less dependent upon his distant bishop. The governing authorities in the Inns of Court were originally styled “Rectors.”

In its primitive form, then, the University of Oxford was an unconscious reproduction of the Parisian Society of Masters. At the end of the twelfth century the University of Paris was merely a customary society, without officers, written statutes, or any other attributes of a recognised legal corporation.

The University of Paris grew out of the Cathedral School, whose first great master was William of Champeaux. In his day, Paris began to rival the scholastic fame of Chartres, of Tours, of Rheims, but it was not until the teaching of his great pupil and opponent Abelard, who also attracted scholars from all parts of Europe, that the schools of Paris surpassed their rivals and laid the foundation of that unique prestige which they retained throughout the mediæval period. In the time of Abelard three great schools, attached respectively to the Cathedral, the church of St. Genevieve and the church of St. Victor, were in existence, but it was from the chancellor of the first alone that the masters obtained their licences.

With the increasing demand for education, the chancellor granted formal permission to masters to open for their own profit schools outside the monastic schools, but under the shadow of the Church. About 1174 this privilege was taken from the chancellor and entrusted to the masters of the Church schools. Indeed, they were forbidden to refuse a licence to any properly qualified candidate. A body of professional customs and unwritten laws gradually grew up. No one could become a teacher unless he had sat for an adequate period at the feet of some duly authorised master. And since the latter was the best qualified judge of his ability, his sanction was naturally essential for a diploma.

Attendance in early times was required for a period of from five to seven years. Moreover, the candidate was not fully qualified until he had given his inaugural lecture in public, under the presidency of his master. This inception, as it was subsequently called, involved two ideas—the formal entrance into the profession by actual performance—a ceremony in Roman law essential to the actual investiture of office—and the recognition by his master and others similarly qualified of his incorporation into the society of teachers.

After the master's cap or biretta had been placed upon his head, the candidate received a ring and an open book, a kiss, and a benediction from his former master. Then, seated in the magisterial cathedra, he delivered his lecture or held a disputation. It was an essential part of the *inceptio* that the new master should entertain the whole or a considerable number of his new colleagues. In addition, presents of gloves and gowns were expected, and later, gifts of money to the funds of the society.

Out of this inception—the ceremonies and mysteries of which may be traced to classical times—grew the idea of the formal gild or close corporation. But there is no evidence of anything more than an informal gild of masters in Paris till the commencement of the 13th century, when about 1208 the body appears to have been regulated by written statutes, though still without a presiding officer.

At first at Oxford, as at Paris, neither the University nor its constituent bodies assembled in buildings of its own. In this lay their strength. A University might secede and take all its property—the students' fees—with it. Houses for schools were hired, and churches and convents borrowed for the congregations and general meetings. And even so, until the close of the 12th century, the University was rather an idea than an institution, and until the middle of the 13th century it was a customary rather than a legal

corporation. Written statutes only date from 1352, and even after that year we hear more of the *customs* of the University than of its statutes. For fully a century before the foundation of the earliest college—that of University College, still legally styled “Great University Hall”—Oxford scholars lived under a system of residence in Halls, Hostels or Inns. These places of residence were independent and self-governing communities. They consisted of bodies of ten to twenty scholars, one of whom became responsible for the rest to the owner of the house. Rules were framed for domestic government by the scholars themselves, which eventually developed into the Aularian Statutes; the scholar who leased the building was elected by them and became known as the Principal, a title given to the head of an Inn of Chancery. The first exercise of control by the Chancellor was marked by the custom of giving security for the rent before that official. It was this custom which enabled the Chancellor to reject unsuitable persons and gradually to supervise their organisation, but it was not till 1432 that the Principalship was limited to graduates, and not till the second half of the 15th century that the Chancellor attempted to interfere with the Aularian Statutes or to impose upon the Halls statutes of the University. But the Principal was always elected by the scholars, his *socii*, and it was not till the reign of Elizabeth that the Chancellor acquired the effective nomination. As late as 1857, however, we find the nomination of the Principal of St. Mary Hall submitted to the Aulares, by whom it was approved.

At this early period, then, the government of a Hall was democratic, and the authority of the Principal was limited by the self-imposed statutes of the community. The transition from such institutions to endowed colleges, presided over by a master and amenable to the regulations of the University, was similar in Oxford, Paris, and the German Universities. But even after the institution of the college,

the Hall survived for two classes of scholars—the sons of the aristocracy and the poorest students who could not afford the cost of residence in a Pedagogy.

So great is the similarity between the Halls of the Universities and the Inns of Court of Chancery that to deny a common origin seems impossible. For the London law student, as for the Oxford scholar, a common centre became a necessity.

Voluntary association in a Hall or Inn for common purposes, such as board and residence, domestic discipline and education, was a universal institution of the age. Long before Edward I commenced his great reform, associations of lawyers and students must have been in existence in the city or just outside its boundaries. Unincorporated and unendowed, we should not expect to find any official records, but it seems evident that they fell within the scope of Edward's reform, in which Henry Lacey, Earl of Lincoln, with Chancellor Burnett, were the leading spirits. The tradition current among the ancients of Lincoln's Inn, in Dugdale's time, that the Earl of Lincoln, "About the beginning of Edward II's reign being a person well affected to the knowledge of the Lawes, first brought in the professors of that honourable and necessary study to settle in this place,"<sup>1</sup> has been scouted as mere self-laudation by the Benchers of this Society.

The early history of the site of Lincoln's Inn has long been a puzzle. The records of Lincoln's Inn commence in the year 1422, the first book being entitled *Liber Hospici de Lincolnsin*. At that date the society was paying rent to the Bishop of Chichester for the occupation of his premises which have since been known as "Lincoln's Inn," whilst the society has for two and a-half centuries used the arms of the Laceys, Earls of Lincoln. How are these facts to be reconciled?

<sup>1</sup> *Origin. Juridic.*, 231.

"Did then the Bishop's house or the Earl's house or both," asks Mr. W. P. Baildon, F.S.A., "constitute the premises known as Lincoln's Inn, and were there in fact two houses or only one?" Mr. Baildon proves incontestably by contemporary documents, first, that the Earl of Lincoln's town house was situated in Shoe Lane at the north-east corner, on a site distinct from that of Lincoln's Inn. This property was known as the Manor of Holbourne, and here it was that the Earl died on February 5th, 1310-11.

Secondly, Mr. Baildon produces evidence to show that the palace erected by Ralph Neville and in which the Bishop died in 1244, was continuously occupied by the Bishops of Chichester as late as 1412-13, and that after the year 1422 they occupied at least six other houses in various parts of London and Westminster as episcopal residences.

The references in contemporary documents since 1422, says Mr. Baildon, effectually dispose of the statement made by nearly all writers that the bishops reserved lodgings for themselves at Lincoln's Inn. It is clear from the Black Books, that the society was in occupation of the Inn in the year 1422, and may be assumed to have taken possession sometime between that date and the year 1415.

In the year 1535, Bishop Sherbourne, the Dean and Chapter, granted a 99 years' lease to William Suliard at an annual rent of ten marks. According to Dugdale, there was a former lease to Francis Suliard, father of William, who was a Bencher of the Inn. William was at this time the senior Governor. The following year the reversion was conveyed to William and Eustace Suliard by Bishop Samson, and in 1580 the freehold was sold by Edward, son of Eustace, to Richard Kingsmill and the rest of the Benchers for the sum of £520. In order to reconcile the above facts with the reason why the Society called itself "Lincoln's Inn" and used the arms of the Laceys, Mr. Baildon submits the following theory.

Thavy's Inn was the resort of one of the earliest, if not the earliest of the law societies of which we have direct documentary evidence.

In 1348, one John Tavy, armourer, made the following devise in his will:—

*“Item lego omnia tenementa mea cum omnibus suis pertinenciis que habio in parte australi in parochia Sancti Andree preter illam shopam quam legavi Isabelle filie mee, ut predictum est, Alicie uxori mee ad totum terminum vite sue, et quod post decessum predicti Alicie totum illud hospicium in [quo] apprenticii habitare solebant per executores meos, et superstitis fuerint, una [cum] executoribus predictae Alicie vendatur.”*

We may note in passing that at this period *apprenticii* when used in connection with *hospicium* meant *apprenticii ad legem*, and that *hospicium* was never used as a term for a gentleman's private house.

Thavy's Inn stood at the south-west corner of St. Andrew's, Holborn. Its principal entrance appears to have been from Holborn, along the west side of the church, but there was also another entrance from Shoe Lane to the south of the church and immediately opposite the Earl's house on the other side of Shoe Lane.

Now it is clear, says Mr. Baildon, that the Earl could not have “brought in the professors . . . to settle in this place,” as Dugdale puts it, *i.e.*, in the present Lincoln's Inn, but it does not preclude the possibility of his having brought them to settle in Thavy's House within a stone's throw of his own door.

“I believe,” writes Mr. Baildon, “that the Society of Lincoln's Inn is identical with that company of apprentices who were living in the house of John Thavy in 1348 and were the persons ‘brought to settle’ there by the Earl of Lincoln.”

According to tradition recorded by Dugdale, the lawyers who first settled in the Temple came from Thavy's Inn, and the late Mr. Inderwick, Q.C., puts the date of their migration as about 1347.

About the year 1383 Mr. Baildon suggests that a second migration on a larger scale took place to the larger premises at Furnivals' Inn, the society taking with them their name of Lincoln's Inn." Dugdale records the existence of a steward's account proving that a legal society was in occupation of this Inn in 1407-8. Thence the same society or the greater part moved "into the still more roomy palace of the Bishops of Chichester, in Chancery Lane, again taking with it its old name. This would be between the death of Bishop Reade in 1415 and the commencement of the Black Books in 1422."<sup>1</sup>

Both Thavy's Inn and Furnivals' Inn, it must be observed, were at the commencement of the Records attached to Lincoln's Inn, the former being purchased by the parent society in 1550, and the latter in 1548.

The following two items of confirmatory evidence are adduced by Mr. Baildon:—

1. That there is no evidence of the house of the Furnivals being called "Furnivals' Inn" until after the Society of Lincoln's Inn had left.

2. The first volume of the Records is entitled *Liber Hospicii de Lincolsin*. Clearly, *Hospicium* and *Inn* are not both wanted. When the society moved in it was known as the Bishop of Chichester's *Hospitium*. The society would therefore correctly describe their new home as the *Hospitium* of "Lincoln's Inn" *i.e.*, of the society of that name.

It is impossible to speak dogmatically of the origin of the sister societies of the new Temple, as it was originally called. Upon the suppression of the Order of the Knights

<sup>1</sup> *Records of Lincoln's Inn*, Vol. IV, 295.



Templars by the Council of Vienne in 1312, and the grant of all their premises to the Knights Hospitallers, that portion of the Temple which lay outside the City boundaries was granted by Edward II to Walter de Stapleton, Bishop of Exeter, and the other portion to Aymer de Valence, Earl of Pembroke, by whom it was surrendered in 1315 to Thomas, Earl of Lancaster. If we may trust an ancient MS., formerly the property of Earl Somers and afterwards of Nicholls, the antiquary, certain lawyers "made composition with the Earl of Lancaster for a lodging in the Temple and so came hither and have continued ever since."

The Earl was executed in 1322. Reverting to the Crown, the Temple was bestowed by Edward upon his new favourite Hugh le Despencer, and after his attainder and execution remained in the hands of the King's Escheator until 1333, when a lease for ten years was granted to "his beloved clerk," William de Langford, at an annual rental of £24.

During Langford's lease, upon the complaint of the Knights Hospitallers, an inquisition was held in 1337, and a division made between the consecrated and the non-consecrated land of the Temple, Langford being left in possession of the latter at a reduced rent. From this inquisition we learn that there were two halls, one being the old Templar's Hall, now the Inner Temple Hall, and the other lying between Pump Court and Middle Temple Lane, which became the hall of the Middle Temple before the present hall was built. If the lawyers who made composition with the Earl of Lancaster were still in the Temple, as we are told they were, they were probably in occupation of the consecrated portion with the Templar's Hall for their use.

In this separation of the Inner Temple into consecrated and non-consecrated, it has been suggested we have the natural origin of the districts which ultimately gave their names to the two societies.

About the year 1340 the Hospitallers at last came into

their own, as Edward III, in consideration of the contribution of £100 for the wars, made an absolute grant of the whole Temple, as distinct from the district known as the Outer Temple, to them.

Dugdale records the tradition, that soon after this grant the Knights Hospitallers "demised the same for the rent of £10 per annum unto divers professors of the Common law that came from Thavy's Inn in Holbourne." Moreover, this tradition is confirmed by the Patent Rolls, from which it appears that, in 1347, the Hospitallers farmed the manor or place of the New Temple to these professors and students of the law. Assuming the Inner Templars were still in occupation of the eastern portions of the New Temple, the title of Inner Temple may well have been given to distinguish it from the western portions which lay between it and the Outer Temple, and which answered to the description of the Middle Temple; at any rate, the Middle Temple could hardly have been prior in origin to the Inner Temple.

Indeed, the title of "Inner Temple" must have originated in the necessity of distinguishing the eastern portion from the western which was now known as the "Outer Temple."

Tradition also declares that the two societies never claimed by separate leases but by one entire grant. This is supported by the Charter of James I to them, whereby there is but one lease of two separate parcels, at two separate rents, each society paying for itself £10 per annum, not the joint rental of £20. It would be only natural for the Hospitallers to seize this opportunity of establishing their relations with both societies in one document.

It has further been suggested that the Middle Templars were an offshoot of St. George's Inn, in Seacole Lane, near the Old Bailey, described by Stowe as an ancient lodging for students in the City, but in his time long ago decayed. This Inn was abandoned at an unknown date for New Inn, formerly "Our Ladye's Inn," which was ultimately attached

to the Middle Temple. The use by the Middle Temple of the Cross of St. George in addition to the Agnus lends some support to this theory. But the theory of descent from Thavy's Inn seems preferable. Briefly then, these two societies were established in the Temple before the close of the first half of the 14th century. This theory of a separate origin, has, in addition to its greater probability, the merit of corresponding with the known facts and accepted traditions. In one respect it is at variance with my former opinion. In the earliest records of Lincoln's Inn, the Middle Temple is described as the ancient ally of that House. From the records of the Inner Temple and Gray's Inn we learn that these two societies also have for centuries regarded themselves as united by close bonds of relationship. Thavie's Inn forms the connecting link between the Middle Temple and Lincoln's Inn, and the similarity of their respective constitutions and customs is strong confirmation of my theory.

It has been assumed that Gray's Inn is the youngest of the Inns of Court. There is not much evidence either way, but what there is points to the probability that this society is little inferior, if at all, in antiquity to the others. Stowe records a tradition current at the Bar in Elizabeth's reign, that Gray's Inn had been an Inn of Court since the days of Edward III.

In the documents of title to the property there is nothing to conflict with this tradition. On the contrary, although the point must not be pressed between the year 1315 and 1370, the description of the property changes from "*messuagium*" to *Hospitium*.

Sometime prior to 1308 the site of Gray's Inn was granted by the Dean and Chapter of St. Paul to Reginald de Grey, Justice of Chester. Upon his death in 1308, the whole property was said to be worth 72s. a year, whilst the tenant paid 42s. 2d. The "messuage with gardens and

with one dovehouse," and thirty acres of arable land, appear to have been in hand. It is quite possible that Grey was himself living in the house as landlord to a society of lawyers. He was himself a lawyer, and we find Ralph Andrewe described in Vincent's *Visitations of Northamptonshire* as "of Grayes Inne in Com. midd a bencher anno 1311."<sup>1</sup>

A list of Readers of Gray's Inn was compiled in the reign of Charles II by Simon Segar, chief butler and librarian to the society, from several ancient registers no longer in existence. This list commences with John Markham, 1391, and also contains further on, out of chronological order, William Skypwith, 1355.

A further corroboration is to be found in Sir Christopher Yelverton's farewell address to the members of Gray's Inn upon his election as Sergeant in the year 1589:—"for I doe acknowledge myself deeplie and infinitely indebted unto this house for the singular and exceeding favours that I and mine ancestors have received in it, and for the great preferments that we have attained to by it; for two hundred years agoe at the least, some of them lived here."

Sir Christopher was a descendant of the Sir William Yelverton, mentioned in the Paston Letters, who was born about 1400, and whose name as Reader in 1440, is found in Segar's List.<sup>2</sup>

If Skypwith was a member of Gray's Inn, and there is no reason to suppose he was not, the following extract from the year book of Edward III would be evidence of the foundation of his Inn long before 1389.

Ingelby having taken an exception at the Bar, Wilby and Skypwith answered that that was never an exception taken in that place, though they had often heard it *entre les apprentices en hostells*.

It was found by the Inquisition on the death of Reginald de Grey the younger, in 1370, that the messuage now called

<sup>1</sup> Douthwaite's *Gray's Inn*, 19.

<sup>2</sup> *Ibid.*, 45.

an "Inn," with garden, shops and land, were worth 100 shillings, and were so let to farm. This Reginald succeeded to the manor in 1343, but there is nothing to show when the Inn was first let. If the evidence adduced may be relied upon, Gray's Inn, instead of being the youngest, is the oldest of the Inns of Court, with the exception, perhaps, of Lincoln's Inn. It would certainly be older than any in continuous occupation of its present home. There is nothing to connect the Inner Temple or Gray's Inn with Thavie's Inn, but the close connection of both the greater houses with St. Paul's does suggest a common origin from a school attached to that church.

We have seen that Gray's Inn was the property of St. Paul's. Another link in the chain is found in the attendance of the members of both Inns at St. Paul's Cross to hear the sermon on Low Sunday, the law day of still earlier times.

It seems reasonably clear, therefore, that the four Inns of Court were fully established as distinct societies at least as early as the first half of the 14th century, and that at this date they differed not at all in character from the other legal hostels which were taking root outside the City walls, and which later became known as Inns of Chancery.

The earliest writer who describes in any detail the Inns of Court is Sir John Fortescue, the celebrated ex-chancellor of Henry VII. Following the young Prince Edward into exile, he produced for his benefit the treatise, "*De Laudibus legum Angliæ*," which has proved a storehouse of legal antiquities to succeeding generations of historians and lawyers.

Requested by the Prince to explain why degrees were not granted in the Common law at the Universities of Oxford and Cambridge to the Common law practitioners, Sir John answered that the laws of England were writ in and made up of three languages, English, French and Latin, and

that the sciences were taught only at the Universities in the Latin tongue. This explanation cannot of course be accepted. In the first place, if it had been necessary to teach in French, the Gallic professors at Oxford or Cambridge would have been quite equal to the occasion. The Common law was not taught, because there was ample provision elsewhere in every respect superior, as Sir John himself admits, to anything which could have been offered at the Universities. Moreover, it would have been utterly opposed to the spirit of the gild, for masterships to be granted by anyone except by the masters of the same gild.

The true explanation appears to be the natural one, viz., that the schools of law were anterior to the Universities. Long before Sir John's time the practice of pleading in French in open Court had been abolished, to wit, by 36 Edw. III, c. 15. It is true that numerous words and maxims from the Gallic tongue had been retained, but these scarcely necessitated a study of modern French.

The importance of Sir John's account, however, consists in his comparison of the Inns of Court and Chancery with what we now call a *University*, but which in mediæval days was called a *Studium*. "The term," says Mr. Rashdall, "which most nearly corresponds to the vague and indefinite English notion of a University, as distinguished from a mere school, seminary, or private educational establishment, is not *Universitas* but *Studium Generale*, and *Studium Generale* means not a place where all subjects are studied, but a place where students from all parts are received.<sup>1</sup>

"Since," says Sir John Fortescue, "the laws of England being learned and practised in those three several languages, they cannot be so well studied in our Universities where the Latin is mostly in use, but they are learned and practised in *quodam studio publico* much more convenient and suitable for the purpose than in any University."

<sup>1</sup> *The Universities of Europe*, Vol. I, 78.

At the beginning of the 13th century the term *studium* was used in a popular sense, and the question whether a particular school was or was not a *Studium Generale* was settled, says Mr. Rashdall, by custom or usage and not by authority. At this period three *studia* enjoyed pre-eminent reputation: Paris, for theology and arts; Bologna, for law; and Salerno, for medicine. A master of the Magisterial Guild, or any of them, was certain of obtaining immediate recognition and permission to teach in all other inferior *studia*, whilst the three *studia* would not receive masters from the other inferior schools without fresh examination.

But in the second half of the 13th century the natural birth and development of a *Studium Generale* ceased. Its creation became a prerogative of the Emperor or the Pope. For instance, in 1224, the Emperor Frederick II founded a *Studium Generale* at Naples; in 1229 Gregory IV did the same at Toulouse; while about 1245 Innocent IV established one in the Pontifical Court itself. Henceforth Imperial or Papal bulls were required to confer upon a *studium* the special privilege of the *jus ubique docendi*. But as some of the earlier *studia*, such as Oxford and Padua, had acquired this right by usage, there was no formal recognition. So with the early law schools of London. It is clear that from the earliest times they enjoyed the privilege. There is no suggestion that it was ever formally conferred upon them. The inference may therefore be drawn with safety that they existed as recognised bodies with recognised privileges acquired by long custom—at least, as early as the second quarter of the 13th century.

And they enjoyed a further privilege, which can only be explained by the gild system, namely the exclusive right of audience of certain members in particular Courts. It has been stated that the judges delegated the right to call to the Bar to the Benchers of the Inns of Court, but there is no evidence whatever of any such delegation. All that

\* the judges have ever done has been to *receive*, as counsel with exclusive right of audience in their Courts, those who had been admitted to the mastership in the Faculty of Law. There is no trace whatever of any *inceptio* of counsel by the judges. There could be therefore no delegation of a power which did not exist. But there was an *inceptio* when the law student was admitted a Master-at-law which took place in the hall of his Inn. So too, when a serjeant was raised to the Bench, an *inceptio* took place in the Court in which he was to practice, a ceremony which survives to this day in Scotland. And it was the Reader who, at the commencement of the Records, called to the Bar in the Inns of Court—the person who gave the lectures on the statutes referred to by Coke, and who presided at the moots. He was the person who could best testify to the fitness of a candidate for the Bar. It was the Reader, therefore, who originally called to the Bar, and it was the Reader who, during his term of office, was the greatest personage in his Inn of Court.

In the twelfth-century Records, eminent civilian lawyers are usually styled Masters. In *Anesty's Case*, 1158, we have Master Ambrose of St. Albans, Master Petrus de Melide of Lincoln, Master Sampson and Master Peter de Littlebury. And in the *Abbot of Battle Case*, in 1176, we have Master Ivo of Cornwall and Master Gerard Pucelle. • It may be said that this proves nothing, since there were civilian lawyers appearing in ecclesiastical Courts. But Master Peter de Littlebury, at any rate, appeared for Anesty in the Curia Regis at Woodstock, receiving forty shillings as his fee. Moreover, at this date, most lawyers were civilians or ecclesiastics, and when they ceased to be either, we find counsel retaining the title of Master, a title which still survives in that of the Masters of the Bench in the Inns of Court.

When the right to admit candidates to the mastership,



or call to the Bar, was restricted to the Inns of Court, it is impossible to say.

In the troublous times of Henry III no doubt many unqualified persons were received by the judges who, in some instances, were themselves deceived. By the Statute of Westminster the First, an unqualified person who appeared in the King's Court for another was liable to imprisonment for a year and a day and more at the King's pleasure. This provision appears to be merely a re-statement of the old law, since in 1244, when the Abbot of St. Martin, who was not an advocate, appeared and pleaded, *narravit*, for the Bishop of Rochester, he was held in mercy.<sup>1</sup>

In the reform of the legal profession inaugurated by Edward I after the judicial scandal of 1289, the lawyers' gild would naturally receive some attention. It has been suggested that the four Inns of Court formed part of his scheme. From their history as given above this is impossible. What appears to have happened is, that the masters and their apprentices moved out of the city about the end of the 13th century or in the early years of the 14th. This migration may have been at the instance of Earl Lacey, or it may have been due to Henry III's writ and have taken place at an earlier date. However this may be, there appears good ground for believing in the existence of a lawyers' gild in the city as early as the 12th century, the members of which consisted of two classes, masters and apprentices or students, scattered about the city in small communities, just as the masters and scholars of Oxford and Cambridge. And we are further justified in believing that these masters were received by the judges as counsel without question upon the faith of their *inceptio* as Masters-at-law. It was this lawyers' gild with its schools which was not only the forerunner of the Inns of Court, but the very same body which eventually

<sup>1</sup> 2 Abbrev. Plac., 137.

constituted those societies. Not the slightest indication is to be found that the Inns of Court derived their rights of teaching and conferring degrees from the government of the day. They were, when we first came across them, customary societies, unchartered, unendowed and unincorporated. Unless they had been in existence in some form or another in the reign of John they would have been created by Edward, when he reformed the legal profession. They were not so created because they were already in existence with the customary powers and privileges of a *studium generale*.

Moreover the resemblance of the Inns of Court and the Hall of our two oldest Universities is too clear to be a mere coincidence. From the examination of their respective constitutions, customs and government, it is abundantly clear that they were the children of a common mother, the gild. And indeed the law schools may even be of earlier date.

Possibly some of the professors of the civil law and their pupils driven out of the city in the early years of the 12th century, founded the first Halls in Oxford.

Like members of a Hall the lawyers and their apprentices congregated in a hospice or inn leased to one or more of the senior members, which developed in precisely the same way into a self-governing society with a similar system of government, its members divided into similar classes, and equivalent degrees conferred by similar ceremonies after a course of training conducted upon similar lines.

HUGH H. L. BELLOT.

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## II.—JUDICIAL STATISTICS, ENGLAND AND WALES, 1909.

### PART I.—CRIMINAL STATISTICS.<sup>1</sup>

THE volume containing the Criminal Statistics for 1909 has attracted attention unusual in amount and quality for a Blue Book. This is due to the Preface, written by Mr. H. B. Simpson of the Home Office, in which he argues that criminality is on the increase, and that this increase is caused by a growing relaxation of public opinion towards crime. The difficulty of drawing any certain conclusions from statistics about crime, is illustrated by the perplexity which has been evoked in most minds by Mr. Simpson's contentions. The statistics of crime are, in fact, one index to the general state of the community, and inferences from them must necessarily, from the nature of the case, be subject to constant qualifications and corrections. The perplexity caused by Mr. Simpson's Preface is only another proof of the famous reflection, that probability and not certainty is the guide of life. "And as there are numberless cases in which, notwithstanding appearances, we are not competent judges whether a particular action will upon the whole do good or harm; reason in the same way will teach us to be cautious how we act in these cases of uncertainty."

At the outset, it is necessary to correct certain misapprehensions. Mr. Simpson is more guarded than some critics have supposed. He does not believe that every kind of crime and criminal is growing; on the contrary, he quotes figures to show that crimes of violence against the person are decreasing, and that, as regards crimes against

<sup>1</sup> *Judicial Statistics, England and Wales, 1909.* Part I.—Criminal Statistics. London: Wyman & Sons, 1911.

property (roughly, all forms of dishonesty), the professional criminal is less prominent than in the past. His real point is that dishonesty is, and has been for the last ten years, to a slight degree more widely spread, "that the increase of crime is due, not so much to an increase in the numbers of habitual criminals, but to criminality having become somewhat more prevalent than it formerly was in the community generally." And his explanation of this increase during the last ten years is, that it is "largely due to a general relaxation in public sentiment" with regard to crime. It will be noted, that both effect and cause are limited strictly to the last ten years.

Mr. Simpson's contention, therefore is, that during the last ten years there has been a change in public opinion which has had dangerous results. The change is twofold. One change is in the direction of glorifying the criminal and his way of life, representing it to be a fine and attractive thing: this change is to be seen in popular and sensational plays, novels and magazines, or newspaper articles.<sup>1</sup> The other change is to be found in a growing disposition to excuse the criminal, arising in the main from a more widespread realisation of the conditions by which the criminal (who is very frequently a man ill-equipped for the struggle of existence) is brought into being. The man who, if there existed a strong and severe reprobation of crime, would have kept straight, steps over the border line which divides honesty from dishonesty, because, it is suggested, the restraining effect of public opinion is weakened. On the one hand he gets into his head that dishonesty is attractive, and that he is a fine fellow for becoming dishonest; on the other hand he excuses himself, and thinks that excuses will be found for him, by reflecting that conditions of life are hard and that he is a victim to circumstances. For the former manifesta-

<sup>1</sup> It is significant that after the Crippen case hyoscine was used by the villain in a newspaper serial story.

tion of public sentiment there is no defence: it is morbid, and in so far as it does have any effect, it is wholly pernicious. To estimate the effect of the latter manifestation, which is wholly distinct in character, is not easy. It is, probably, the chief mark of the development of public opinion during the last fifty years, that there has been a decay of individualistic ideas and a growth of the idea of social responsibility for the individual. To quote a recent writer,<sup>1</sup> "Let us note a hopeful sign, manifest during the last twenty years, both here and in England. It is the diffusion among the educated and richer classes of a warmer feeling of sympathy and a stronger feeling of responsibility for the less fortunate sections of the community. There is more of a sense of brotherhood, more of a desire to help, more of a discontent with those arrangements of society which press hardly on the common man than there was forty years ago. This altruistic spirit . . . has already become a more efficient force in legislation than it ever was before. We may well hope that it will draw more and more of those who love and seek to help their fellow-men into that legislative and administrative work where opportunities for grappling with economic and social problems become every day greater." It is to the growth of ideas such as Mr. Bryce here mentions that recent penal legislation is due. The Prisons Act 1898, the Probation of Offenders Act 1907, and the Prevention of Crime Act 1908 are examples, and the Preface cordially recognises their value. At the same time, it is unfortunately true that there are individuals so constituted as to take advantage of anything that serves their ends, and it may well be that some members of the community find temptation or even inducement to lapse from integrity in the general spread of sympathy for the lot of the poorer classes. It is neither

<sup>1</sup> Bryce, *Yale Lectures on the Responsibilities of Citizenship*, 1909.

desirable nor indeed possible to set back the tendency to explore the root causes of the evils of the body politic, and it may be the case that the corresponding tendency of the "marginal" man to abandon ways of honesty is the price to be paid for our increased knowledge. It cannot be urged that the tendency to understand more fully the complex conditions of the national life is wrong. This would be perilously near to "drawing up an indictment against an whole people," and Burke's reflections on such a proceeding are familiar: "I cannot insult and ridicule the feelings of millions of my fellow creatures as Sir Edward Coke insulted one excellent individual (Sir Walter Raleigh) at the Bar. I am not ripe to pass sentence on the gravest public bodies, entrusted with magistracies of great authority and dignity, and charged with the safety of their fellow citizens, upon the very same title that I am. I really think that for wise men this is not judicious; for sober men, not decent; for minds tinctured with humanity, not mild and merciful."

It is a truism that the ultimate effects of public opinion or its expression in legislation are hard to forecast, and that by remedying one evil you may create another. It is therefore impossible to deny, in the abstract, that the general spread of sympathy for the less favoured classes of the community may have entailed certain disadvantages in weakening the self-restraint of men on the border line. If crime has increased,<sup>1</sup> it is not impossible that the increase may be due to this

<sup>1</sup> It should be observed that the figures which are relied on to show an increase of crime only increase (and that not invariably) from 1899 onwards, and tended to decrease till that date. The Prisons Act was passed in 1898, and it is obvious that the ideas which issued in that Act must have been in the air for some considerable time before 1898. Those ideas were therefore contemporaneous with a decrease of crime at any rate for some years. Again, it should be remembered that public attention was preoccupied by the South African War from 1899 onwards, and that, therefore, any increase in crime during that period cannot, without qualification, be ascribed to any phase, morbid or otherwise, of popular opinion. Moreover, the figures for 1909 are less than the figures for 1908 by nearly 2 per cent. These considerations should serve to prevent too easy an assent to the views stated in the Preface.

cause. It is at any rate difficult to discover any other strong cause which has an equal show of plausibility, or which can be shown to be a new factor in the sum total of the conditions of society. But, on the other hand, if crime has not seriously increased, it can only be supposed that the deterioration of moral fibre which might be expected, in the abstract, to result from the increasing kindliness of public opinion, is prevented by other forces equally intangible, such as education. Dogmatism on matters of this kind is impossible, but there is no reason for dissenting from Mr. Simpson's theory as to the tendencies or effects of the changing public attitude on the question of crime.

Ten years are, however, only a moment in the life of a society, and possibly the increase now under consideration, which is not uniformly progressive, may be imperceptible when the period from 1899 to 1910 is studied in years to come as a part of a longer period. It may then appear to be merely a casual variation, such as it is difficult to explain with any finality.

We now turn to the statistics themselves. Offences are divided as usual into three main classes:—indictable offences, *criminal* non-indictable offences, and other non-indictable offences.<sup>1</sup> The first class is plain: the second includes offences which involve some element of dishonesty, fraud, violence or cruelty: the third includes all the minor offences known to the law. The number of persons tried for the first of these three classes of offences is generally used as the most reliable index to the volume of crime; and it includes, of course, not merely the cases actually tried on indictment, but also the indictable cases tried summarily. As will be seen from the foot-note, these figures for 1909 show a decrease when compared with the figures for 1908, but they

<sup>1</sup> The figures for 1909 are: indictable offences, 67,149; *criminal* non-indictable offences, 74,399; other non-indictable offences, 584,707. The corresponding figures for 1908 were 68,116, 80,132, and 608,832. It will be seen that each class has decreased in 1909.

are higher than the figures for any year since 1899 (when they were 50,494) with the exception of 1908. This increase of 16,655 over 1899 is due almost entirely to the increase of persons tried for larceny, and (in a much less degree) to the increases for burglary and housebreaking—62,000 persons roughly were tried for these offences in 1909, as against 46,000 in 1899. The figures in this class are dominated by the figures for offences against property which are roughly 12-13ths of the whole class, and the decrease in 1909 as compared with 1908 is due to the decrease of about 1,000 offences of dishonesty. Indictable offences against the person vary very slightly—the figures for 1909 are 2,653, as against 2,785 in 1899, and 2,742 in 1908. Similarly, the figures for forgery and coining remain fairly constant, about 300, 311 in 1899, 381 in 1908, and 379 in 1909. Malicious injuries to property move between limits roughly of 350 and 450. When inferences therefore are drawn from the figures for indictable offences, it must be remembered that they relate almost entirely to dishonesty. The numbers for the different forms of dishonesty vary in a somewhat puzzling fashion. Mr. Simpson's point, as we saw, is that criminality is somewhat more prevalent among the community at large, not that the professional criminal is more to the fore. This view is based on two sets of figures. On the one side, the numbers of habitual criminals estimated by the police to be at large on the first Tuesday in April of each year, do not vary very greatly: in 1909, the number was 4,064; in 1900, 5,256; in 1901, 4,813; and in 1908, 4,255. On the other side, Mr. Simpson argues that the figures for larceny from the person (*i. e.*, pocket picking) are a good index to the activity of the professional criminal, and these figures have dropped almost steadily from 3,007 in 1899 to 1,795 in 1909. Burglary and housebreaking, however, show a fairly steady increase, though the increase is much greater for housebreaking. The figures



in 1899 for burglary were 1,234, and for housebreaking, 2,537: the corresponding figures for 1909 are 1,834 and 5,207. The figures are somewhat disturbing, because neither of these crimes appears to be suitable for a novice. Noah Claypole preferred the "kinchin lay" to the more daring exploits of Bill Sikes. However, the increase is chiefly in housebreaking, and no doubt the distinction between housebreaking and larceny is sometimes rather thin, and again it may be suggested that housebreaking is not a particularly venturesome matter in expanding suburbs, where police protection is not so efficient as in more populous quarters, and where houses may often be left temporarily unoccupied during the day. At the same time, it is well to note that there is at any rate a difficulty in reconciling the increase of these two offences and the decrease of pocket-picking.

Two points may appropriately be mentioned here, in connection with the increase of figures for offences of dishonesty, which are worth bearing in mind. In the first place, of the rough total of 58,000 indictable offences of dishonesty in 1909, about 1,700 were committed<sup>1</sup> by children under 14, and about 1,600 by children between 14 and 16. That is to say, about 3,300 were committed by persons who had not reached 16, or about 6 per cent. of the total, and it is a large assumption that youths and girls over 16 can be reckoned as being of years of discretion. It should therefore be remembered, in dealing with the statistics of dishonesty, that they include juvenile crime, and do not relate entirely to adults. In the second place, the figures which have been used relate solely to indictable offences. But certain of the *criminal* non-indictable offences involve dishonesty, and are only technically distinct from indictable offences of dishonesty. They should therefore be taken into account when considering the amount of dishonesty, and it is satisfactory to note that they do not

<sup>1</sup> See Table XIII.

increase, but on the contrary tend to decrease. From Table E it appears that non-indictable offences of stealing, unlawful possession, &c., averaged for the period 1895-9, 7,048; for 1900-4, 6,703; for 1905-9, 6,480; the figures for 1909 being 6,628. While, therefore, it seems plain that during the last ten years there has been an increase of dishonesty, though the figures for 1909 suggest that the tide is on the turn, it seems equally plain that the increase is not so great as appears from an examination of the total of indictable offences, considered apart from the non-indictable offences of dishonesty.

The figures for *criminal* non-indictable offences show a considerable decrease when compared with the figures for 1908 and with the average figures for preceding periods of five years. They were 74,399 in 1909, as against 80,132 in 1908, 105,735 in 1895-9, 94,288 in 1900-4, and 80,359 in 1905-9. The decrease is almost entirely due to the fall in the figures for assaults. These were 43,161 in number in 1909, a decrease of nearly 30,000 compared with the total for 1895-9.

The remaining (non-criminal) non-indictable offences also decrease—584,707 in 1909 as against 608,832 in 1908. This is mainly accounted for by a decrease of about 20,000 convictions of drunkenness, and of about 10,000 convictions of breaches of the Education Acts. On the other hand, vagrancy offences increase from 116,000 in 1908 to 123,000 in 1909.

The tables relating to the various Courts show that about 80 per cent. of indictable offences are dealt with summarily. At Courts of Assize 3,084 persons were convicted and 729 acquitted. At Courts of Quarter Sessions 8,243 were convicted and 1,409 acquitted. Incidentally, it may be mentioned that at Quarter Sessions 538 persons were sentenced as incorrigible rogues, having been convicted by Courts of Summary Jurisdiction and sent on to Quarter Sessions for sentence under the Vagrancy Act 1824. At Courts of Sum-

mary Jurisdiction 712,507 persons were proceeded against; of these 551,675 were convicted, while in 70,394 cases the charge was proved (though technically there was no conviction) and the offenders dismissed, or ordered to enter into recognizances, or released on probation, or committed either to industrial schools or to the custody of a relative, etc. Table X relates to proceedings in the Court of Criminal Appeal—the figures show that 26 convictions were quashed, 38 sentences were affirmed, 35 sentences were quashed but some other sentences substituted, and 4 sentences were quashed. 389 applications for leave to appeal were refused. Only persons convicted on indictment have the right to appeal to the Court of Criminal Appeal, and the result is therefore that of over 11,000 such convictions only 26 were quashed. There were 143 appeals to Quarter Sessions (Table XV), and 58 convictions were quashed. An appeal to the Court of Criminal Appeal costs nothing, while an appeal to Quarter Sessions involves expense. It is significant that of the 143 appeals to Quarter Sessions 33 were in connection with motor-car offences, and 35 in connection with offences against the Intoxicating Liquor laws.

The Police Tables (XIX to XXVIII) cover much the same ground as the tables relating to persons tried for offences, and need not be discussed at length. 105,287 indictable offences were reported to the police—66,093 persons were arrested in connection with them, and of this number 28,448 were convicted summarily and 13,398 were committed for trial.

The Prison Returns (XXXI to XLI) show that 221,199 persons were received into prison, 173,214 having been convicted summarily and 9,600 on indictment. 181,695 were under sentence of imprisonment, five-sixths of this number having sentences of less than six weeks. This fact is sufficient in itself to indicate the difficulties that beset the prison authorities in finding suitable employment for men of all trades and no trades detained for very short periods.

It is also noteworthy, that of the persons serving terms of imprisonment, 92,699 were committed in default of paying a fine, a total larger by some 3,000 than the number imprisoned without the option of a fine. Figures are quoted on page 15 of the Preface, which show that the per-centage of persons who are ordered to pay a fine, and who go to prison instead of paying, is increasing. In 1909, the per-centage was 20·0, whereas in 1900 it was 14·73.

The Table XLIa is new, and relates to Borstal Institutions, created by the Prevention of Crime Act 1908. They are intended for young offenders between 16 and 21, who are on the way to becoming habitual criminals, and who may be saved by a relatively long term of detention (12 months and up to 3 years), in which habits of self-control and industry may be established. The offender must have committed an offence punishable by penal servitude or imprisonment, and Courts of Assize and Quarter Sessions alone can commit to a Borstal Institution. 186 youths and girls were admitted to these institutions (167 youths and 19 girls)—171 were committed direct by the Courts, and 15 were transferred there from prison by the Secretary of State, under powers conferred by the Act.

Table LIII gives the details of the working of the Probation of Offenders Act in 1909, showing that 8,962 offenders were placed under the friendly supervision of a probation officer, an increase of over 900 as compared with 1908; of these 6,862 were males, and 2,100 females. Of this total 3,398 were under 16 years of age. Of the 8,962 persons released under the supervision of a probation officer, 182 were subsequently sent to prison for breaking the conditions of the probation order, 42 were sent to Reformatory schools, and 186 were dealt with for fresh offences committed while they were still under probation. It is interesting to note that 6,525 probation orders were made in cases of indictable offences—that is to say, that in more than 10 per

cent. of the total number of persons tried for indictable offences the Courts decided that the offender could best be dealt with, not by immediate punishment, but by release under the supervision of a probation officer.

The volume concludes with the details of the exercise of the prerogative of mercy. Four free pardons were granted during 1909, 13 capital sentences were commuted to penal servitude for life, and 269 sentences of imprisonment were remitted in whole or in part. Of these remissions, 153 were granted on medical grounds, and in 60 cases as an act of clemency.

## PART II.—CIVIL JUDICIAL STATISTICS.<sup>1</sup>

The Civil Judicial Statistics for 1909 do not present any remarkable new features. They are edited with his usual ability by Sir John Macdonell, to whose comments and tables we are much indebted. Although in comparison with 1908 there is an increase in the total proceedings in all Courts of about 10,500, this is more than accounted for by the increase of proceedings in the County Courts, which amounts to very nearly 17,000. Borough Courts of Record, Ecclesiastical Courts, Durham and Lancaster Chancery Courts, the Judge in Lunacy, and the Railway and Canal Commission, each show a small increase, but added together the increase from these Courts only amounts to 438. To counterbalance these increases the Appellate Courts each show a decrease, amounting altogether to 61; the Chancery Division one of 278; the King's Bench Division one of 6,273. The learned Editor points out that the figures of litigation must be read subject to the observation that as "a large number of criminal cases are in the nature of money claims

<sup>1</sup> *Judicial Statistics, England and Wales, 1909.* Part II—Civil Statistics. London: Wyman & Sons.

though a penalty is imposed, it may be a question of procedure rather than of substance, whether in a given set of circumstances the remedy is criminal or civil." Ninety-two appeals were entered in the Judicial Committee; this is five less than the year before, but slightly above the quinquennial average of 1905-9, which is 89·4. The average for the preceding five years was 95·2. It is rather curious that the number of Appeals disposed of was exactly the same as that entered, so that a similar number, namely, 100, was pending at the end as at the beginning of the year. Of the Appeals entered during the year 49 were from Indian Courts and 35 from Colonial Courts. The fate of the Appeals from these two groups was somewhat different. In the first case, out of the 31 heard the judgment was affirmed in 12 cases and reversed in 19. The North West Provinces Allahabad Court was unfortunate enough to have nine judgments reversed to one affirmed. The Colonial Courts on the other hand had 19 judgments affirmed to 10 reversed and one varied. The most unfortunate Court of all was that of the Supreme Court of China and Corea, which had four of its judgments reversed and none affirmed. The business of the Judicial Committee also included 69 petitions for special leave to appeal, as many as 19 of which were from the Supreme Court of the Dominion of Canada. Of all these petitions 41 were granted and 28 refused. The Court sat on 91 days. .

The Appeals presented to the House of Lords numbered 108 as against 112 in 1908, but it must be remembered that the latter number was the largest of late years. Of these Appeals 70 came from England, 32 from Scotland, and six from Ireland. The Appeals finally adjudicated on were 60. As regards the Court of Appeal, England, in 30 cases the judgments were affirmed and in 11 reversed. The judgments of the Court of Session, Scotland, were affirmed in eight cases and reversed in seven, while the Court of Appeal, Ireland, had one decision affirmed and three reversed.

There was an unusually large number of interlocutory petitions, namely, 175 against 130, a large majority of which were granted or allowed. Of the 60 cases heard 29 were decided under three months from the setting down for hearing, and 22 from three to six months, which shows that the House of Lords is at any rate, as Sir John Macdonell observes, "one of the most expeditious of tribunals." He has also compiled an interesting little table showing the per-centages of affirmations and reversals in English and Scottish Appeals to the House of Lords for the last five years. The highest per-centage of affirmations in English Appeals was 76·67 in 1906 and the lowest 58·82 in 1905. The highest per-centage of affirmations in Scottish Appeals was 87·50 in 1908, and the lowest was in the year under notice, when it was as low as 53·33. It may be noticed that the House of Lords only heard and determined 60 Appeals as opposed to 84 in the previous year, although they sat for judicial business 94 days as against 83.

Six hundred and two appeals were set down in the Court of Appeal, which is a smaller number by 18 than that of 1908; but as, at the commencement of the year there were 190 appeals pending against 141 in 1908, the total for hearing was 792 against 761. Of the appeals set down during the year, 123 were from the Chancery Division, 284 from the King's Bench Division, and 129 from the County Courts. There were also 224 appeals from interlocutory orders set down. There is a marked difference between the results of appeals from the Chancery Division and the King's Bench Division. Sixty-six judgments of the former were affirmed, 10 varied, and 22 reversed; that is, the affirmations were about 66 per cent. of the whole. Of the judgments of the latter 134 were affirmed, 4 varied, 104 reversed, and 13 new trials ordered. Roughly speaking, the affirmations were about 50 per cent. The despatch of business by the Court was satisfactory, as they disposed of

649 cases as opposed to 571 in the previous year, and left 143 pending as against 190; but only disposed of 218 interlocutory appeals as against 252. The appeals from County Courts were all under the Workmen's Compensation Acts, and were the highest numbers yet recorded.

Coming to the King's Bench Division, the decline in business is marked. The writs of summons were 62,916, as compared with 69,130 in 1908. There was a decrease of 300 in judges' summonses, 2,000 in masters' summonses, and 4,600 in orders made. Although many fewer proceedings were commenced, more actions were entered for trial in London and Middlesex, and on circuit, the total being 3,493 against 3,423.

It is worth noting that there was a small but distinct increase in the civil business on circuit, the actions set down and tried being 935 and 699, as against 909 and 658 in 1908. The usual black list of assize towns with small business is given. They are 32 in number, and Oakham, perhaps, is the most conspicuous for paucity of work. Its record is taken for the annual average for the two periods of 1900-4 and 1905-9. Number of civil cases tried, 0·2 and 0·4; total amount recovered, £1. Number of persons tried, 1 and 2·2; number of days judges sat, 2 and 1·8. Although the increase in actions tried both in London and Middlesex, and on circuit, was small, the amount recovered was considerably larger, increasing from £435,242 to £533,211 in London and Middlesex, and on circuit from £103,473 to £120,211. These last figures, however, do not give much information as to the amount or importance of the work done. A much larger proportion of cases are tried with juries on circuit than in London and Middlesex, the per-centage being 71·39 to 44·84. The proportion of cases in the Order XIV has been steadily increasing. The annual average per-centage from 1895-9 was 15·21, for 1900-4 was 16·17, and for 1905-9 it has risen to 20·70.



As so much interest is taken in actions for libel and slander, it may be interesting to call attention to two tables which the Editor gives in his Introduction. The first compares per-centages of the amounts of verdicts given in London and Middlesex, and on circuit respectively, in actions for defamation for the last ten years. In 1909 the per-centage of verdicts in actions for libel in London and Middlesex, which were for sums of £100 and under, was 58·1, while on circuit it was 78. In actions for slander the respective per-centages were 90 and 93. It is curious to note that in the year 1901 the per-centage of actions for slander tried in London and Middlesex, which resulted in verdicts of £100 or under, was 100. It is not difficult to understand why "slanderers are mulcted much less than authors of libel." Another interesting table shows the annual average of amount recovered for libel and slander, from which it appears that for 1900-4 the average recovered for libel was £8,024 in London and Middlesex, and £3,958 on circuit, and for 1905-9 £14,180 and £13,486 respectively. The increase in the amount of the verdicts on circuit for the second period is remarkable. In cases of slander the average for 1900-5 for London and Middlesex was £1,009, and for 1905-9 £1,293; while on circuit the averages were £1,953 and £1,954, an extraordinary equality of results. •

The statistics relating to County Courts show that their business continues to increase. The number of plaints in 1909 was 1,368,110, an increase of 20,000 on the previous year. It is, however, worth noting that this increase is entirely due to the larger number of plaints for amounts not exceeding £20, as all the classes of plaints for larger amounts show a small decrease. This is the probable reason why the total amount for which plaints were entered was less than before, namely, £4,038,174 as against £4,121,831. More actions were determined both without

hearing and on hearing, the respective numbers being 462,200 without hearing, and 458,250 on hearing in 1909, and 438,313 and 453,467 in 1908. Fewer cases were decided before the judge, and also before the judge and jury, but the whole increase in actions determined on hearing was in those before the registrar, which increased by over 6,000, namely, from 413,176 to 419,540. Cases tried before judge and jury fell from 872 to 780.

One very important feature of County Court work is the proceedings under the Workmen's Compensation Acts. In 1909 there was a substantial increase in the total number of cases, which were 6,509 against 6,124; the lump sum of compensation awarded was a good deal less, sinking from £140,547 to £130,126; but the amount of weekly payments increased from £681 to £744. There was a falling off in the number of memoranda registered, as in the year 1908 they had amounted to 22,125, and in 1909 they were 18,763, and the amount of compensation was less both by the lump sum and weekly payments, the one falling from £502,899 to £455,021, and the other from £4,138 to £3,848.

The only other Courts whose figures we propose to comment on are those of the Probate, Divorce and Admiralty Division. The number of Probates and Letters of Administration taken out in 1909 was 70,683. The number has been a very constant one, as the annual average 1905-9 is 70,069. The highest in those years being 72,197 in 1905 and the lowest 66,970 in 1906. Sir John Macdonell calculates that this means that there is Probate or Letters of Administration in the case of about 20 per cent. of the adults who die. The total value of the property admitted to probate was £272,290,094, a considerable increase on the previous year, when it was calculated at £257,470,958. The net value was £246,237,553 against £230,305,291; but it must be remembered that the latter figure was nearly eleven millions lower than that in 1907.

The annual average of 1905-9 was £242,329,369. The total amount paid for death duties was no less than £19,201,335. As the Editor estimates the capitalised wealth of the United Kingdom at £5,909,701,272; if the figures of probates, &c., applied to the United Kingdom, the amount paid in duty in 1909 would be about one-third of £1 per cent. of the whole wealth, but as we assume the probate figures only apply to the property which was dealt with in the probate offices of England and Wales, the per-centage would be considerably smaller. The Editor comments on the small amount of litigation connected with the passing of so much property, as only 102 probate actions were entered in the year. He gives the figures as to trials for the last ten years, from which "it appears that only about one case in 500 gave rise to actual litigation." This may be partially accounted for by the ill-success of attempts to set aside wills, as in the last ten years only 73 wills have been set aside, giving an average of about  $7\frac{1}{4}$  per year.

Probably in consequence of the great public interest aroused recently in the question of divorce, Sir John Macdonell has paid special attention to the statistics of the Divorce Court. In 1909 both the petitions filed in matrimonial causes, and the suits disposed of, were fewer in number than the year before, the petitions being 984 and the suits disposed of 822, as against 1,011 and 866. Although 508 petitions were presented by wives to 475 by husbands, yet of the petitions for dissolution of marriage 451 were presented by husbands and 336 by wives. The total difference is mostly accounted for by the fact that wives presented 89 petitions for judicial separation and 68 for restitution of conjugal rights against similar petitions from husbands of 4 in each case. The husbands were successful in their petitions for dissolution of marriage in 380 cases and the wives in 305, and 16 husbands were

successful as respondents against 6 wives. In suits for judicial separation 24 wives were successful and 1 husband. Sir John has devoted a good deal of care to ascertain as far as possible the duration of marriage and personal conditions of the parties to the matrimonial suits commenced in 1909. It appears from the table as to duration of marriage that one husband filed his petition when he had been married less than one year, and that three had done so in 1908. Thirteen husbands and 11 wives had been married more than one and less than two years; 66 husbands and 50 wives two years and less than five; 137 husbands and 155 wives five years and less than ten; 204 husbands and 227 wives ten years and less than twenty; and actually 54 husbands and 65 wives, or a total of 119, filed their petitions after twenty years and upwards of married life.

Sir John has compiled a table showing the ages of the parties at date of marriage, in which it will be seen that over 25 per cent. of the wives were under 21. This may possibly point to early marriages leading to matrimonial unhappiness, but unless we know how many wives had married under 21 the suggestion is not worth much. The Editor has made an attempt to ascertain if possible from the table of occupations of husbands, the number of petitions presented by persons belonging to the working classes. We have found it in some instances rather difficult to adjust the figures in the different tables, but the Editor's conclusion is that the proportion of petitions presented by members of the working classes in 1909, was 27.44. The small number of petitioners under the heads of Agriculture and Mining is, as the Editor says, remarkable; but we do not think that it is surprising in the case of domestic service when the conditions of that service are remembered. There is a table, new we think this year, which tabulates the occupations of husbands so

as to show whether they were petitioners or respondents. In the unspecified occupations of gentlemen, esquires, etc., they come out badly, 81 petitions being by the wives to 29 by the husbands. We are glad to say the legal profession shows up creditably, two barristers were petitioners and three respondents; while among the solicitors there were eight of each. Military and naval officers numbered 32; in 15 cases the husbands, and in 17 the wives petitioned.

The last of these tables shows the number of children of the marriage, and illustrates once more how the existence of children safeguards a marriage. In 410 cases there were no children, and in 241 only one child; above six children there were only nine cases.

It may interest our readers to examine the table of jurors summoned. In the year 1909, no less than 75,515 were summoned. This seems at first a heavy burden on the classes from which they are drawn, but on looking at the table we find that nearly 17,000 of these are grand jurors whose duties are of but short duration; it must be remembered too, that at a number of the County Assizes the business lasts a very short time, and that a considerable number of the jurors who are summoned are excused.

### III.—THE LAW RELATING TO COMMISSIONS AND "TIPS."

THERE is a good deal of misconception and confusion in the popular mind and even in the minds of lawyers as to the state of the law with regard to commissions and "tips." When the Prevention of Corruption Act of 1906 was passed, the attention of the public was called to its provisions by the Press under such inaccurate headlines as "Tipping now a Crime," and "Tips now Illegal." When

the recent decision of the Court of Appeal in *Penn v. Spiers and Pond* was reported in the newspapers, its purport was announced in such terms as "A Nuisance now Legalised," and "Tips now Legal." Headlines like those reflect the confusion of the popular mind and are of course misleading. As there are tips which are legal and tips which are illegal, it may not be uninteresting to deal briefly with the present state of the law on the subject.

It has for a long time been settled law that the acceptance of a commission or a gift or a tip by an agent, where the giving of the commission or tip is not secret but is open and known to the principal or within his knowledge, is quite lawful. Where the principal is aware that the agent is getting some allowance or commission, and there is no attempt at deception, the agent may keep it.<sup>1</sup>

It is equally clear that a gift or commission, received by an agent without the knowledge of his principal, is a bribe. The Courts of Equity laid it down as an inflexible rule that no agent can be allowed, in the matter of his agency, to make any profit for himself without the knowledge and consent of his principal. The secret gift is a profit which the principal has a right to recover from the agent, whenever it comes to his knowledge.<sup>2</sup> The fact that the principal did not suffer any injury by reason of the dealing of the agent, cannot be taken into consideration in the application of the rule of equity.<sup>3</sup> An agent must under no circumstances take advantage of his position as agent to accept a gift unknown to his principal. If an agent accepts a secret gift, he may be dismissed by his principal, even although the gift is not discovered for several years afterwards.<sup>4</sup> Further, the law lays down that a sale effected through

<sup>1</sup> *Holden v. Webber* [1860], 29 Beav. 117. *Great Western Insurance Company v. Cunliffe*, L. R. [1874], 9 Ch. 525.

<sup>2</sup> *Phosphate Sewage Company v. Harmont*, L. R. [1877], 5 Ch. D. 394, 457.

<sup>3</sup> *Parker v. McKenna*, L. R. [1874], 10 Ch. 96.

<sup>4</sup> *Boston Deep Sea Fishing and Ice Company v. Ansell* [1888], 39 Ch. Div. 339.

giving a secret gift or commission is void. Where, for example, on the sale of horses, a veterinary surgeon received a bribe from the vendor to certify horses as sound which were unsound, the sale was void, and the purchaser was released from his bargain.<sup>1</sup>

The law is laid down by Lord Justice Bowen with his accustomed clearness in *Boston Deep Sea Fishing Company v. Ansell*.<sup>2</sup> "There can be no question," said Lord Justice Bowen, "that an agent employed by a principal or master to do business with another, who, unknown to that principal or master, takes from that other person a profit arising out of the business which he is employed to transact, is doing a wrongful act, inconsistent with his duty towards his master and the continuance of confidence between them. He does the wrongful act whether such profit be given to him in return for services which he actually performs for the third party, or whether it be given to him for his supposed influence, or whether it be given to him on any other ground at all; if it is a profit which arises out of the transaction, it belongs to his master, and the agent or servant has no right to take it, or keep it, or bargain for it, or to receive it without bargain, unless his master knows it."

While the civil liability of agents who receive gifts is as stated by Lord Justice Bowen, the law with regard to commissions from the criminal point of view has long been equally clear. To offer a bribe to an agent or *employé* in order to influence him in relation to his principal's or employer's affairs, or for an agent or *employé* to accept such a bribe, constitutes a misdemeanour at Common law. In *R. v. De Kronmme*,<sup>3</sup> a person solicited a servant to conspire to cheat and defraud his master, and offered a bribe to the servant as an inducement to him to sell his master's

<sup>1</sup> *Shipway v. Broadwood*, L. R. [1899], 1 Q. B. 369.

<sup>2</sup> L. R. [1888], 39 Ch. Div. 339.

<sup>3</sup> *R. v. De Kronmme* [1892], 66 L. T. 301.

goods at less than their proper value. It was held that the person giving the bribe was guilty of conspiracy. The Common law thus provides a principal, who is defrauded, with a criminal as well as a civil remedy.

The law being as stated above, an Act of Parliament was passed dealing with the subject from the criminal point of view, which came into operation in 1906. It was called the Prevention of Corruption Act, and was founded on a Bill first introduced by the late Lord Russell of Killowen. Lord Russell's Bill was the result of the Report of the Special Committee on Secret Commissions of the London Chamber of Commerce. The Report was adopted by the Council of the Chamber in 1898, and revealed a deplorable amount of commercial dishonesty. The Committee stated that "the mass of corruption which the evidence before the Committee shows to exist may appear to some persons so great and complex as to render it hopeless to struggle towards purity." Lord Russell, however, was no pessimist, and he was a stickler for commercial honesty. He hated fraudulent bankrupts and dishonest company promoters and extortionate money-lenders. As Mr. Vaughan Nash wrote after his death, "In the campaign which he waged with Sir Edward Fry against corrupt commissions and commercial bribery—a thankless piece of cleaning up, if ever there was one—you saw the reformer in full cry, scattering anathemas, his eyes ablaze, and robes and ermines streaming in the wind. It was wonderful to see how the squalid-looking crusade took on a serious aspect. In any other man's hands, proposals for making commercial travellers and drapers' buyers honest by Act of Parliament would have been laughed or sneered out of Court, and wise men would have agreed that it was Quixotic. But in the Court of the Lord Chief Justice people didn't laugh."

The Bill of Lord Chief Justice Russell was introduced



by him, but in spite of his zeal for commercial purity, was not passed. It was subsequently introduced by Lord Alverstone and by Lord Chancellor Halsbury, and frequently passed the House of Lords, but not the House of Commons. At last the Bill, which became the Act of 1906, was introduced in the House of Lords by Lord Halsbury, and was ultimately adopted as a Government measure. It enacted, firstly, that it was a misdemeanour for an agent to corruptly accept or agree to accept, or attempt to obtain, any gift or consideration as an inducement or reward for doing or forbearing to do any act, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs. It enacted, secondly, that it was a misdemeanour for any person to corruptly give or agree to give or offer any gift or consideration to any agent as an inducement or reward for doing or forbearing to do any act, or for showing or forbearing to show favour or disfavour to any person, in relation to his principal's affairs. It enacted, thirdly, that it was a misdemeanour for any person to knowingly give to any agent, or any agent to knowingly use, with intent to deceive his principal, any receipt or other document which contained any statement which was false or defective in any material particular, and which to his knowledge was intended to mislead the principal. Persons guilty of the misdemeanours created by the Act were to be liable to conviction on indictment or summarily, and in either case might be imprisoned with or without hard labour, or fined, or both.

A careful perusal of the Act shows that only nominally new offences are created. What had previously been crimes at Common law are definitely made so by statute. It would at first sight seem that some benefit had been gained by the provision for dealing with the offence summarily, but the provision is rendered somewhat illusory by section 2 (1), which provides that no prosecution can be instituted without

the consent of the Attorney-General or Solicitor-General. Nothing tends to thwart the operation of a criminal enactment so much as the necessity of obtaining the consent of the Attorney-General or Solicitor-General. The Act also contains another illusory provision in section 2 (2), which incorporates the provisions of the Vexatious Indictments Acts. The operation of those Acts is expressly excluded by sect. 1 of the Vexatious Indictments Act 1859, in cases where indictments are preferred with the consent in writing of the Attorney-General or Solicitor-General, so that subsections (1) and (2) of section 2 are contradictory. On the whole, therefore, the law was not really altered by the Act of 1906.

To sum up, then, the law may be stated as follows:—

(1) Commissions and Tips, if open and unconcealed, and given to the agent with the principal's knowledge, are legal.

(2) Commissions and Tips, given to the agent without the principal's knowledge and for the purpose of influencing him in relation to his principal's affairs, even if the principal did not suffer any injury, are illegal. The principal has (a) a civil remedy, and may recover the amount of the bribe from the agent. He has also (b) a criminal remedy both at Common law and under the Prevention of Corruption Act, 1906, and may prosecute the agent.

In conclusion, it may be stated that the law relating to Tips, came under consideration in 1908 in the case of *Penn v. Spiers and Pond*.<sup>1</sup> In that case the question arose as to whether the "tips" given to a waiter on a restaurant car running on the London and South Western Railway were part of his "earnings" under the Workmen's Compensation Act, 1906. The Court of Appeal held that they were. The Master of the Rolls, in giving judgment, said "We desire to state that nothing in this judgment

<sup>1</sup> L. R. [1908], 1. K. B. 766.

extends to "tips" or "gratuities" (a) which are illicit; (b) which involve or encourage a neglect or breach of duty on the part of the recipient to his employer; or (c) which are casual and sporadic and trivial in amount. But where the employment is of such nature that the habitual giving and receiving of "tips" is open and notorious, and sanctioned by the employer, so that he could not complain of the retention by the servant of the money thus received, we think the money thus received with his knowledge and approval ought to be brought into account in estimating the average weekly earnings."

In November of last year the case of *Penn v. Spiers and Pond* was followed in *Knott v. Tingle, Jacobs and Co.*,<sup>1</sup> where it was held that a county court judge, in calculating a workman's average weekly earnings, was entitled to take into consideration tips received by a carman, who was employed to leave and collect goods, even though such tips were given for services outside his ordinary employment.

J. A. LOVAT-FRASER.

#### IV.—ON THE SUMMONING OF A JURY.

IT was reported sometime ago in the press that a judge of assize, returning from Liverpool to Manchester to hold adjourned assizes, would be unable to try common jury actions, because for his first sittings a full panel of 144 had been summoned and was now discharged, and his power of requiring the attendance of fresh jurors was exhausted until the issue of a new commission. Some misapprehension had possibly existed in the mind of an under-sheriff or circuit official as to the effect of sect. 22 of the County Juries Act 1825 (6 Geo. IV, c. 50), which, as will presently be

<sup>1</sup> Butterworth, *Workmen's Compensation Cases*, vol. IV, p. 55.

seen, is an enabling and not a limiting section, but when the list of causes was published a fair proportion of them was set down for hearing with a common jury, and we hope they were satisfactorily disposed of.<sup>1</sup>

There are few matters pertaining to everyday usage and affecting the convenience of respectable citizens, about which less is known to the world at large than Jury law. The practice and sanctions regarding it are with difficulty to be gleaned from old statutes, the principal one now unrepealed being the County Juries Act above mentioned, which abound in references to "laws, customs and usages," and are largely wrapped up in the traditions of circuit, sheriffs' and coroners' offices. A large and increasing number of persons are exempted from serving on juries, but scarcely one man in a hundred, and among the ninety-nine must frequently be reckoned high judicial personages, is aware that the right to exemption can only be claimed once a year at the annual revision of the jury lists by magistrates at petty sessions, and that all persons whose names appear on the lists which are then signed must, unless incapacitated by illness, serve if summoned. The growing practice of judges and recorders after protracted trials to direct that certain jurors shall not again be summoned for a term of years, or even for life, is supported by no statutory authority, and seems to be an unwarrantable encroachment upon the discretion of the summoning officer.

It is generally known that jurors were originally called upon to adjudicate on matters which were thought to be within their own knowledge, and that so far from acquaintance with the facts of the case which was to come before them being a disqualification, up to 1825 the want of hundredors, or persons residing in the "hundred" where the alleged offence was committed or dispute arose, was

<sup>1</sup> The difficulty has since been set at rest by the passing of the County Common Juries Act 1910, which repeals the words "not exceeding 144" in the section referred to.

ground of challenge. The writ for the summoning of a jury, addressed to the sheriff ran: "*Venire facias coram, etc., duodecim liberos et legales homines de vicineto de A., etc.*" The six hundredors required by the Statute 35 Hen. VIII, c. 6, were reduced by 27 Eliz., c. 6, to two, and by the County Juries Act, 1825, were dispensed with altogether. The only cases now in which jurors are specially sought from the neighbourhood are lunacy inquiries.

The summoning officers (except where coroners have been wont to issue precepts to their own bailiffs, or jurors summoned in towns corporate), have always, apart from circumstances of personal disqualification, been the sheriffs. To them were addressed precepts from judges of assize and justices of the peace to provide jurors for the trial of criminal issues, and the writs of *venire facias* sued out by plaintiffs who had causes to be determined. The *legales homines (supra)* in the first instance were no doubt freeholders from the neighbourhood, and one of them at least must be a knight, to whom and to esquires, properly so termed, it would appear the property qualification attached to other jurors did not apply.<sup>1</sup> For service in criminal cases it is to be gathered from one of the early codifying statutes<sup>2</sup> that it was usual to return two panels, probably of 24 persons each, one of which served on the grand inquest to present indictments, and the other to try as petty jurors such bills as might be found, and it must be remembered that in those days there being no Indictable Offences Acts under which depositions would be in existence before the holding of assizes or sessions, it was impossible to forecast the volume of criminal business for which the services of petty jurors would be required.<sup>3</sup> In civil matters it was different. Each

<sup>1</sup> *Scible*, per 23 Hen. VIII, c. 13, s. 2.

<sup>2</sup> 7-8 Will. III, c. 32, s. 8.

<sup>3</sup> Hence the inherent power of Courts of criminal jurisdiction to enlarge panels. County Juries Act 1825, s. 20.

suitor who wished to bring his action to trial sued out a writ of *venire facias* addressed to the sheriff, who thereupon attached to it a panel of 24 names.<sup>1</sup> The return to this writ was followed by a further writ of *habeas corpora* (if the issue was in the Common Pleas), or of *distringas* (if it was in the King's Bench or Exchequer), in which the names of the 24 jurors were recited, and penalties set upon each of them if they did not appear on the appointed day. Reasonable notice was to be given them which in 4 & 5 Will. and Mary was fixed at six days.

Even with these elaborate precautions the necessary 12 out of the 24 summoned did not always appear, and statutory provision was made for adding *tales*<sup>2</sup> to the panels. Reference to talesmen is first found in a statute of Henry VII, providing for the trial of attaints,<sup>3</sup> and in an Act of Henry VIII, entitled "An Act for the better appearance of Jurors in *Nisi prius*," it is specially enacted that, "In every writ of *habeas corpora* or *distringas* with a *nisi prius* where a full jury shall not appear before the justices "of assises or *nisi prius*, or else after the appearance of a "full jury by challenge of the parties the jury (*sic* ?) is likely "to remain untaken for default of jurors, then the same "justices upon request made by the party, plaintiff, or defendant, shall have authority by virtue of this Act to "command the sheriff or other minister or ministers to "whom the making of the said return shall appertain, to "name and appoint, as often as need shall require, so many "of such other able persons of the said county then present at the said assises or *nisi prius* as shall make up a "full jury; which persons so to be named and impanelled "by such sheriff or other minister or ministers shall be "added to the former panel and their names annexed to

<sup>1</sup> For each assise 24 was made statutory as early as 13 Edw. I, c. 38. By "assise" in this sense is meant the trial by jury, which was introduced *temp.* Hen. II, as an alternative to trial by battle.

<sup>2</sup> *I. e.*, men of like qualifications.

<sup>3</sup> 11 Hen. VII, c. 21.

"the same."<sup>1</sup> By 4 & 5 Will. and Mary, c. 24, s. 18, the qualification of talesmen is made half that of ordinary jurors; and by 7 & 8 Will. III, c. 32, which declares that trials of issues may be postponed for want of jurors, talesmen are specially to be sought among those who have been returned to the same assizes upon some other panel.

This last Act, which is entitled, *inter alia*, "An Act for the ease of Jurors," is the first to contemplate a limit to the enormous number of persons who by reason of a long cause list might have been compelled to give attendance at one assize. Henceforth—but in the county of York only—ten panels of 24 persons each were to be returned for the trial of all civil causes, and one panel of 48 was to be returned for the grand inquest. The effect of this would be that if more than ten writs of *venire facias* had been sued out the same panel might be annexed to more than one writ, and the names included in the subsequent writs of *habeas corporas* or *distringas*. No statutory provision was made as yet for the attendance of petty jurors as such in criminal cases.

It was not till the general Act of George II<sup>2</sup> that the system of summoning jurors to serve in all civil causes indifferently was established. Sect. 8 provides that a general panel, containing not less than 48 or more than 72 names (except by direction of the judge going the circuit, who would naturally have regard to the number of writs of *venire facias* issued), should be annexed to each writ, and that the names contained in the general panel need not be copied into the *habeas corpora* or *distringas*. The names of the persons to serve in each cause were to be drawn from a box or balloted for. Provision is also made for the first time for the procuring of special jurors as such. Hitherto a panel might, upon order of the Court, have been specially struck or selected from the freeholders' book which it was the duty of the sheriff to keep. Hereafter they were to be

<sup>1</sup> 35 Hen. VIII, c. 6, s. 6

<sup>2</sup> 3 Geo II, c. 25.

drawn, and reduced in the presence of the parties, from lists which were now prepared and published for the first time, and in this case, instead of the general panel, a special panel of 48, reduced to 24, would be annexed to the *venire facias*, and, at the trial, 12 of the 24 names be drawn to constitute the jury.

The County Juries Act 1825, already referred to and still in force, re-enacted the provisions as to general panels, which were now to be extracted from a properly kept Jurors' Book, and made the important advance of empowering (not requiring) judges of assize to direct jurors to be summoned to serve indiscriminately on the criminal or the civil side. The number to be summoned was in the first instance not to exceed 144, and (with a view to their convenience) they need not all be summoned for the same day, but to give their attendance in two groups or sets.<sup>1</sup> It was this limit of 144 which probably puzzled the officials of the Northern Circuit. They overlooked the fact that by sect. 15 the judges appointed to hold the assizes might direct a greater or lesser number than 72 or 48 to be inserted in the panels annexed to the various writs, and that, by sect. 20, the same persons might exercise the powers they had previously enjoyed for the amending or enlarging panels returned for the trial of any issue in the criminal Courts. It is unnecessary to consider here the summoning of jurors to view, whose attendance might have been secured as far back as 3 Geo. II, c. 25, by special writs of *venire facias*, *habeas corpora*, and *distringas*, and who, on the calling on of a cause, were to be sworn first, irrespective of any drawing of cards from a ballot-box.<sup>2</sup>

The writs of *venire facias*, *habeas corpora*, and *distringas* were abolished in 1852 by the Common Law Procedure Act,<sup>3</sup> and jurors were thenceforth, whether the judge's precept directed it or not, summoned for the trial of all

<sup>1</sup> Sect. 22. <sup>2</sup> 3 Geo. II, c. 24 s. 14; 6 Geo. IV, c. 50, s. 23. <sup>3</sup> Sect. 104.



issues, civil and criminal.<sup>1</sup> It is conceived that sect. 20 of the County Juries Act 1825 thereupon became applicable to all jury panels, civil and criminal alike, and that the judge might orally or otherwise, at any time, direct the return of a jury for the trial of any issue, or the enlargement of one already returned. If time permitted for the ten days' service of the summons directed in sect. 25, and for the publication of such new or enlarged panel<sup>2</sup>—and there would have been time for all this at Manchester—so much the better. But sect. 20 does not seem to render this imperative, and a juror who failed to appear after receiving less than six days' notice would be exempted from penalty under sect. 20 of the Juries Act 1870.

By 1852, too, the employment of special juries had become so common that statutory provision was taken for the return of a panel of special jurors, not exceeding 48, to each assize, if six days' notice had been given to the sheriff by the parties interested in procuring their attendance, there to be balloted for, as with common jurors.<sup>3</sup> The limit of 48 was abolished in 1898 by the Special Jurors' Act of that year, and the fact that it was only deemed necessary to make the Act applicable to special jurors supports the contention that power to summon an unlimited number of common jurors already existed. In London\* and Middlesex special jurors were still to be nominated and reduced before the sheriff or secondary in a manner specially provided in sect. 110. Such nomination and reduction from the separate list of persons qualified to serve as special jurors kept in pursuance of sect. 31 of the County Juries Act 1825, or even from the freeholders' book according to the ancient method,<sup>4</sup> might however still be had with the approval of the Court, even in counties.<sup>5</sup>

<sup>1</sup> Sect. 105.

<sup>2</sup> Sect. 19.

<sup>3</sup> C. L. P. Act 1852, s. 112.

<sup>4</sup> County Juries Act 1825, p. 33.

<sup>5</sup> C. L. P. Act 1852, s. 110.

The Juries Act of 1870 placed London and Middlesex with regard to special jurors on a par with the counties.<sup>1</sup> Saving the right of the Court to have a jury specially struck, thirty special jurors taken from those whose names were marked "special" in the Jurors' Book might be returned for service in each of the superior Courts upon issue of a judge's precept, and thus returned they were to be treated and balloted for like common jurors. When serving as special jurors they are entitled to a fee not exceeding one guinea each,<sup>2</sup> but though marked as "special" in the Jurors' Book they can claim no exemption from serving without reward as common jurors,<sup>3</sup> a fact too frequently overlooked at the present time both by summoning officers and by jurors themselves.

J. K. F. CLEAVE.

## V.—THE PREVENTION OF CRIME AND REFORMATION OF CRIMINALS.

IT would be difficult to imagine a document more formal than a modern statute—the long quaint preambles of an earlier day have disappeared, and unless one happens to be interested in the matters to which the statute relates, one is apt to regard it somewhat as a mysterious "bolt from the blue." The truth is of course very different. An Act of Parliament is no sudden arbitrary edict of the sovereign power, but is the result of ideas which have been in the air for a longer or a shorter period. "A law must have something behind it; some positive sentiment or conviction, without which it would be unaccountable and unmeaning."

<sup>1</sup> S. 16.

<sup>2</sup> County Juries Act 1825, s. 35.

<sup>3</sup> Juries Act 1870, s. 19 (2). It may not be strictly accurate to say "without reward." Customary payments, rarely exceeding one shilling, are made in different Courts to common jurors.

Political philosophers have discussed the question of the relation of law to public opinion, and it is a common-place that a law probably is the expression of the opinion of the moderate section of the nation, that it lags behind the most enlightened about as much as it is in advance of the reactionaries. It is therefore wrong to suppose that recent statutes affecting crime and criminals represent a sudden change of attitude on the part of the public, and it may be taken that they are approved by sensible men who are anxious to reduce the amount of crime.

We propose in this article to give a brief account of the attempt which has been made in the past year or two to deal with the criminal. There are two Acts of Parliament—the Probation of Offenders Act 1907, and the Prevention of Crime Act 1908—to be considered, and also certain administrative changes in regard to convicts on licence. The former statute may be used in regard to any offender, while the latter deals with two classes, young offenders and habitual criminals. We shall commence by an account of the former.

The Probation Act, which repeals section 16 of the Summary Jurisdiction Act 1879, the Probation of First Offenders Act 1887, and section 12 of the Youthful Offenders Act 1901, is an Act "to permit the release on probation of offenders in certain cases." Before the Act, courts had power in suitable cases to discharge an offender, with or without his entering into recognisances, even though the offender's guilt was clear. The offender was given another chance, and for practical purposes was dismissed altogether. True that he might be under obligation to appear before the Court for judgment if called upon, but practically he never was called upon. The Court had no knowledge of his behaviour after his trial, and there were no means by which it was possible for the Court to judge whether leniency had been misplaced. Sometimes of course the offender got into

trouble again, and his lapse was brought to the knowledge of the Court which had previously dealt with him : the Court might then cause him to be brought before them for judgment. But practically this happened only rarely. Again, some philanthropic person or society might undertake at the request of the Court to watch or assist an offender, and in this way the Court might informally learn what was happening in a given case. This supervision, however, was of an informal nature, and lacked precision and effectiveness. The Probation Act remedies the defects of this system. In any case in which "having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed," the Court thinks that it is expedient, it may release the offender on probation for a period not exceeding three years. Probation is of two kinds—one is merely the old method of discharge with or without recognisances, and leaves the Court with no other or better means than previously for ascertaining how the offender conducts himself during the period of probation. The second kind of probation—which is the distinctive creation of the Act—involves the supervision of the offender by a probation officer. This is the valuable element of the probation system. The probation officer—who is appointed for the Metropolitan Police Courts by the Home Secretary, and for other Courts of Summary Jurisdiction by the Justices—is the agent of the Court, and it is his duty when an offender is placed under his supervision to visit him or receive reports from him at intervals, to see that he observes the conditions of his recognizance, to report to the Court on his behaviour, to advise, assist and befriend him, and, when necessary, to try to find him work. The result, therefore, of the Act is that the Court has power to say to any offender guilty of an offence, "You will receive no punishment at present, but for a given time (up to three

years) you shall be under the supervision of the probation officer, who will help you as much as possible, and who will also report to us as to your conduct. If you behave well throughout the probation period, you will hear no more about your offence; if you do not, he will report to us, and you will then be liable to be brought before us and punished for your original offence." It will be seen that there are two novelties about this. In the first place, the offender is no longer dismissed and left to take his chance with such voluntary assistance as he may be able to obtain—on the contrary, he has a friend in the probation officer who will assist him to retrieve his character. In the second place, the Court is no longer in the dark as to the results of its action—on the contrary, it is kept informed of the offender's progress, and if the offender shows no disposition to profit by lenience, it can punish him, and thus prevent the abuse of its lenience by the particular offender, and also warn others that probation is a reality and not merely an easy means of escaping deserts.

This system is not so easy to work as it seems at first sight. It requires a person of unusual talents for probation officer—a man or woman of character and tact, able to influence those under his or her supervision in the direction of integrity. It requires extra work on the part of the Court. If the system is to be properly carried out, the Court must continue to keep an eye on the offender throughout the period of probation—it is no use merely to make a probation order and then to take no further interest in the case. The probation officer ought to be able to feel that his work is a matter of concern to the Court, and the offender ought to have the wholesome knowledge that his conduct is under observation, and that failure to redeem his past will bring down upon him the punishment of the law.

If, however, there is a capable probation officer, and if the Court fulfils its part by watching the progress of the case,

probation is a most valuable element in the penal system. It is an attempt by the State to help offenders to pull themselves together with the assistance of an official appointed for that purpose, and without the necessity of imprisonment, and it secures that an offender who will not avail himself of this assistance shall not escape scot free (with a consequent failure of justice), but shall be duly punished for his offence.

The Probation Act is applicable to any offender in whose case the Court thinks that probation will be useful. It aims at reformation, without the necessity of imprisonment, through the moral force of the probation officer and the knowledge of the offender that he must exert himself to improve and so escape punishment. The Prevention of Crime Act is more restricted in its scope. It is an Act "to make better provision for the prevention of crime, and for that purpose to provide for the reformation of young offenders and the prolonged detention of habitual criminals." It is therefore intended to catch the young offender before he is hardened, and to seclude the hardened offender for a long time.

The Borstal system is now fairly well-known, and it is perhaps unnecessary to explain that for some years past attempts had been made (originally at Borstal Prison) to deal with the problem of the young criminal. The success of the treatment led to the first part of the Prevention of Crime Act. It is there provided that any person between 16 and 21, convicted on indictment of an offence for which he is liable to penal servitude or imprisonment, may be sentenced to detention under penal discipline for not less than one year or more than three years in a Borstal institution, if the Court is satisfied that "by reason of his criminal habits or tendencies or association with persons of bad character," it is expedient that he should be subject to detention for such term and under such instruction and discipline as

appears most conducive to his reformation and the repression of crime. Before, however, such sentence can be passed, the Court must consider reports from the Prison Commissioners as to the offender's suitability for this treatment, and must be satisfied, after weighing all the circumstances (including health and mental condition), that the offender is likely to benefit by it. Roughly, therefore, it may be said that the Act is intended to secure the reformation of the young offender who is on the high road to becoming a regular criminal. The treatment adopted in the Borstal Institutions is designed to build up the offender in body and character. He is worked hard and is taught a trade; he is exercised and developed, and generally licked into shape. The essential element is that sufficient time must be given for these influences to have effect; an unruly, undisciplined youth is not drawn into the ranks of honest and industrious citizens in a moment. When the lad has had sufficient training, instruction and discipline in the Institution, and is considered fit to re-enter society, he may be released on licence, and placed under the care of the Borstal Association. "After-care" is recognised as a necessary part of any scheme of reformation of character—it would be courting failure in many cases to release a lad absolutely and leave him to take care of himself on release. The Borstal Association, therefore, takes the lad in charge on his release. It finds him work (not any work, but work for which he is suited), and by means of its agents keeps in touch with him while he is on licence and very often long after. Philanthropic work of this nature is most difficult and meets with little recognition, but it should be remembered in any account of the Borstal system that after-care is almost as valuable as the treatment in the Institution—it supports the youth during the critical period when he is no longer under restraint, but is enjoying conditional liberty, and it assists him till he is established in honesty

and industry. The Borstal treatment is therefore a recognition by the State that mere imprisonment is not a solution of the problem of the young criminal, but that it is necessary to educate him and build him up mentally and physically, and to look after him till he becomes a respectable member of society. Crime will be prevented by the reformation of the young offender.

While probation existed in a more or less informal shape before the passing of the Probation Act, and while the Borstal methods were in use before the Prevention of Crime Act, there existed no special treatment of habitual criminals before the latter Act came into force. There had, of course, long been prevalent the idea that steps should be taken, when a dangerous criminal proved incorrigible, to provide for his removal for a lengthy period from society. The gains of such a course were twofold—society would be protected from the criminal, and the criminal would have less opportunities for corrupting younger men. The second part of the Prevention of Crime Act (Detention of Habitual Criminals) was designed to give effect to this idea. In its original shape, the Bill provided for the detention of such criminals for life, but it was modified while passing through Parliament, and, as it became law, it reads that where a person is convicted on indictment of a crime,<sup>1</sup> committed after the passing of the Act, and subsequently the offender admits that he is or is found by the jury to be an habitual criminal, and the Court passes a sentence of penal servitude, the Court, if of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, may pass a further sentence,

<sup>1</sup> Crime means, in England and Ireland, "any felony, or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanour under the fifty-eighth section of the Larceny Act 1861."



ordering that on the determination of the sentence of penal servitude he be detained for such period not exceeding ten or less than five years, as the Court may determine. This detention is called "preventive detention," and its general nature is similar to that of penal servitude, with such modifications in the direction of a less rigorous treatment as the Secretary of State may prescribe by Rules. Persons undergoing this form of detention are to be subjected to such disciplinary and reformatory influences and shall be employed on such work as may be best fitted to make them able and willing to earn an honest livelihood on discharge. Before anyone can be sentenced to preventive detention as an habitual criminal, he must be found (1) to have been convicted of a crime, since reaching 16, at least three times previously to his conviction of the crime charged in the indictment, and (2) to be leading persistently a dishonest or criminal life; and the consent of the Director of Public Prosecutions must be given before the charge of being an habitual criminal can be brought.

It will be seen that a sentence of preventive detention cannot be passed unless the offender is convicted of a crime for which a sentence of penal servitude is imposed. Preventive detention cannot be combined with a sentence of imprisonment, as distinct from penal servitude. The Act came into force in August 1909, and as the minimum term of penal servitude, which must be served before the offender passes into preventive detention, is three years, no one is yet undergoing that form of detention. The intention of the Act is mainly to protect society by the removal of the offender, but it is also hoped that the discipline will reform him, so that two ends are served by the statute.

Draft Rules for Preventive Detention have been laid before Parliament, and they provide for relaxations of the conditions of penal servitude, *e.g.*, by allowing increased opportunities for association. These relaxations are, of

course, comparatively slight as compared with the main fact of the loss of liberty.

A memorandum on the Act was prefixed to the Draft Rules, and enunciates principles of administration for the purpose of securing uniformity of action among the numerous police authorities of England and Wales, and for the purpose of carrying out the intentions of Parliament. It is pointed out that the Act was intended to deal with dangerous professional criminals who pursue a life of crime with deliberate purpose, and not with persons who merely drift into crime from some weakness or defect of character; and it is laid down for the guidance of the police that no case should be submitted to the Director of Public Prosecutions, for the purpose of obtaining his consent to a charge of being a habitual criminal, unless the offender (i) is over 30 years of age, (ii) has already undergone a term of penal servitude, and (iii) is charged anew with a substantial and serious offence. "The Act must not be resorted to as an easy and painless solution of the difficult problem of habitual crime, but must rather be regarded as an exceptional means of protecting society from the worst class of professional criminals."

This brief sketch of the Probation Act and the Prevention of Crime Act shows that there is in existence a reasoned and comprehensive scheme for dealing with crime. The Probation Act applies to every offender in whose case the Court thinks that probation may be the means of reformation. It is not restricted to first offenders, though no doubt in practice it is applied most frequently to them. The absence of previous convictions indicates that criminal habits are not ingrained in the character, and that the offender will respond to the influence of the probation officer. For the youth or girl who shows signs of becoming a regular criminal, the prolonged discipline and training of the Borstal system provides the means of eradicating

criminal habits and of building up an honest character. For the professional criminal, the system of preventive detention has been devised, with the primary object of protecting society and with the incidental object of reforming the criminal.

The Children Act of 1908, it may be noted in passing, provides special treatment for children and young persons under the age of 16. A child under 16 dealt with by a Court of Summary Jurisdiction must be tried in a Juvenile Court, and no child under 16 may be sent to prison, unless a special certificate is given by the Court that he is so unruly as to be unfit for a place of detention provided under the Act. Children may be committed to an industrial school, or to a reformatory school, the broad distinction being that industrial schools are to be reserved for children who are neglected or homeless rather than criminal, and that reformatory schools are to receive children who may display signs of criminality. Probation is of course freely used for juvenile offenders, and, where a child has a home, it is clearly preferable that the child should remain at home under the supervision of a probation officer who can rouse the parents to a sense of their responsibilities, rather than be removed from home and sent to an institution. Each case is, however, to be judged on merits, and where home conditions are so bad that the probation officer cannot mend matters, it is obviously wisest to remove the child altogether away from them to other surroundings. The treatment of children is, however, something of a special subject, and no attempt has been made in this article to summarise the provisions of the Children Act in regard to crime. The Act was in the main a consolidation of existing law.

Lastly, we may notice the arrangements which have been made as from April 1st, for dealing with convicts released on licence. A convict (*i. e.*, an offender sentenced to penal

servitude) is able by good conduct and industry to earn his release from prison before the expiration of his sentence—a man can thus earn release after serving three-fourths of his sentence, a woman after serving two-thirds. For the remaining one-fourth or one-third the convict is at liberty on licence. This liberty is conditional. A male convict (the “ticket-of-leave” man), is required to report to the police (in person, or by letter if the police allow), once a month till the expiration of his sentence: he is also required to report to them any change of his address, and if he moves from the district of one police authority to that of another, he is required to inform each authority of his movements. There exist many societies for assisting discharged convicts, and a Board has now been formed—the Central Association for the Aid of Discharged Convicts—which contains representatives of these various agencies. The Central Association acts as a clearing-house, and arranges with the various societies that such-and-such a licence-holder shall be looked after by such-and-such a society. The society will then endeavour to find the man work and to keep him in the path of honesty, and reports will be made to the Association as to his progress. The Association is taking steps to provide agents in each police district, and, no doubt, in some cases will be directly responsible for the welfare of the licence-holder. The object of this scheme is to provide definite and systematic assistance for licence-holders, and it is hoped that it will be possible in many such cases to substitute supervision by this voluntary and philanthropic Association for supervision by the police. While there is no reason to think that the police have interfered unduly with convicts on licence—in fact, they very frequently assist and befriend them—it is all to the good that a serious attempt should be made by philanthropic agencies to assist the convict to an honest place in society. Failure to respond to the efforts of the Association will result in the licence-holder being

placed under the old conditions of police supervision. It *will be interesting to observe* the effect of this arrangement on the numbers of those who have been sentenced to penal servitude and who relapse into crime after their release.

## VI.—CURRENT NOTES ON INTERNATIONAL LAW.

### The Savarkar Case.

A feeling of considerable relief may be expressed that the Arbitration Court at the Hague is not yet enthroned as the absolute tyrant of nations. In the nature of things, the decrees of a limited number of fallible men cannot replace the general current of public opinion as providing a law for the world. The very people who are most prone to clamour for the crection of a compulsory Court which shall supersede all wars by its judgments, are those who are most likely to be staggered by the Savarkar decision. But there were not a few far-seeing pacifists, both in Europe and America who had, months ago, realised this danger. The specious proposals of Mr. Knox for the establishment of a Universal Court were seen to amount to premature Federation. Such a Court might easily be the powerful engine of absolutism and of *étatist* tyranny. The danger was realised: the Savarkar decision demonstrates its imminence.

The two latest decisions of the Hague Tribunal appear to us profoundly unsatisfactory. In the Newfoundland Fisheries Case, the Tribunal took from the United States what it is quite obvious the American negotiators of the old treaties thought they had secured:—a definite easement or *profit-à-prendre*. They restored it to the States, in effect, in the form of an irritating and uncertain restriction on the “reasonableness” of Newfoundland legislation. How

utterly unworkable this vague restriction was, is proved (if proof were necessary) by the fact that Great Britain and the United States have with one accord thrown over the neutral Dutch Commission which was to decide what was proper in the circumstances for them; and have arranged to settle that detail for themselves. And now comes the Savarkar case. Prof. Lammasch (Austria) was here succeeded as chairman by Mr. Beernaert (Belgium), and Mr. Gram (Norway) succeeded Dr. Drago (Argentina), but the Earl of Desart and Baron de Savornin-Lohman retained their places; so did M. Renault, who seems to be fast coming to occupy the position once attributed by an active journalist to the German Emperor—that of “Chief Justice of Europe.” It may perhaps be supposed that Baron de Savornin-Lohman was the British nominee on both occasions. If so, Mr. Gram must have been the choice of France, unless Mr. Clunet is right in assuming that each name was mutually acceptable. Baron Alex. de Savornin-Lohman is one of the foremost jurists of the Netherlands. The most prominent part of his long and honourable career has been spent as Professor of Constitutional and Criminal Law at the “Free” University of Amsterdam. He has for many years been a pillar of the Conservative party in one or other branch of the Netherlands Legislature, and was in the Cabinet of 1890-1. He enjoys a great reputation as a publicist, but his achievements in the field of International law seem to be limited to his having acted as arbitrator in recent years on four occasions. The first of these was the case between Mexico and the United States; the second that between France and Britain concerning the Muscat dhows; and the third and fourth, the Newfoundland Fisheries and the Savarkar cases. In early life, Baron de Savornin-Lohman (who was born at Groningen in 1839) had considerable experience as a local judge, resigning membership of the Appeal Court at Bois-le-Duc in 1884 to take up his Amsterdam Chair. Baron de Savornin-Lohman

is not a member of the Institute of International Law. A favourite constitutional apothegm of his may be quoted—"And now abide Wisdom, Justice and Freedom, these three: but the greatest of these is Freedom." He is a high authority on the religious difficulty in education.

Mr. Gram has been an Associate of the Institute of International Law since 1898. He has had considerable international experience—first as Swedish judge of the mixed Courts in Egypt (1875—1882), and afterwards as Norwegian resident at Stockholm, and arbitrator in the Behring Sea Case (1893). He was a Minister of State from 1893 to 1898.

Let us now examine the Savarkar award. We have heard no lawyer in this country approve it. It amounts to the proposition that any violation of territory is permissible if it is exercised in the supposed interests of society and obtains the countenance of a policeman. There was a clear infraction of French sovereignty when the accused, escaping to French soil, was dragged from it by British agents. *But* it was not done against the will of the French Government: it knew of Savarkar's transit through its waters and had not objected. And its "brigadier"—who was not, we assume, a field officer—assisted in the capture! We have only to contrast these circumstances with those which attended the successful escape of the Polish exiles to British soil in 1840 (see *L. M. & R.*, November, 1910, page 88), to be painfully struck by the little grasp which the Hague Court evinces of the great principle of Territorial Sovereignty. One cannot but feel that the French case was put forward without enthusiasm. It is an open secret that it was only owing to the Socialist party, that any reclamations were made at all. We have no sympathy with Socialism, or with Savarkar. But we are sure that it will not do to weaken the territorial principle.

Importance seems to have been attached to the fact that the British and French police authorities were in communication regarding Savarkar, and that the Prefect of the district was instructed by the French Minister to take the necessary measures to prevent revolutionary Hindus living in France from attempting a rescue. The London police were, in fact, informed that the necessary instructions were being given to guard against any "incident" during the presence of Savarkar at Marseilles. Britain might perhaps have had a ground of complaint if, after these officious undertakings, sympathisers of Savarkar had been allowed to approach the ship in which he was being conveyed; or if in any similar manner his escape had been facilitated. But no undertaking was ever given or suggested, that France would deliver him up if in fact he did escape. As a fact, the men who effected the arrest chased Savarkar for a quarter-of-a-mile: and this action and the subsequent expulsion went far beyond the assurances given.

Stress, again, seems to be laid on the good faith and absence of consciousness of any illegality on the part of the captors. But if we establish that people can do what they like on the strength of their good intentions, we pave an easy causeway to intolerable anarchy. The accused was in fact removed from the soil of France by a subordinate *employé* at the request and with the assistance of foreigners. If that is not a violation of French sovereignty, it is difficult to know what is. Let us again refer to the case of Peter Martin (68 State Papers, p. 1223). Here was a desperado who was being conveyed for trial in British Columbia across the soil of Alaska. One can hardly imagine that the Alaska police did not countenance and implicitly support that transaction, and in fact, a letter was written to them inviting their assistance (Lovell to Joscelyn, *ibid.*, p. 1225), so that they clearly had notice. Yet the United States demanded



and obtained his restoration to freedom. "No one," says the *Times*, "supposes that the Court was unanimous" in the Savarkar case. It cannot be called a very valuable precedent, and we repeat that it is satisfactory that the projected World Court is not yet riveted upon us.

### The Declaration of London.

This remarkable instrument still hangs fire. It is now between three and four years since we observed in these pages that the International Court of Prize was little likely to materialise, unless a law were provided for it to apply. It is over two years since we expressed a doubt whether the select coterie of ten military powers which were convened to elaborate a Prize law would ever agree upon one. It is just two years since their rapid and sudden agreement compelled our reluctant admiration.

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That admiration did not, however, extend in all respects to their work. Completed in what must be called a hurried session of two months or less, it embodies in an unmistakeable fashion the principle, strange to Prize law, that a neutral merchant is sufficiently protected if his rights are secured in theory, however difficult it may be to make them avail in practice. Accordingly, we have never ceased to insist here on the fatal results which would flow from accepting the specious jural refinements of the Declaration as satisfactory equivalents for the practice which it is intended to displace. Stress has been laid by later and abler voices on the damage which is done by the Declaration to the interests of Island Powers, whether belligerent or neutral. Mr. Leverton Harris, Mr. T. G. Bowles, Mr. Atherley Jones, K.C., and Mr. Pickersgill, may be mentioned as, in greater or less degrees, impressed by this very obvious consideration. Here we are concerned to view the discussion in a dry light, divested of national prepossessions. And it

does appear, looking at the matter from this point of view, that the neutral stands to lose all round. The old certainty of safety, unless there is something wrong with your papers (or your crew) is gone. You must be prepared to justify every voyage in a court of law. This is exactly what the old law of the sea did its best to avoid. The old jurists, with experience of maritime war, knew that conflicts of testimony in prize instances must ever be unsatisfactory. We know that it is notoriously difficult to get at the truth in the Admiralty Court. That difficulty is twenty-fold increased under the conditions which attend prize instances. The evidence is mostly written; witnesses must otherwise be summoned from the ends of the earth; cross-examination is impossible; the Court is unfamiliar with the language and the juridical ideas of the parties. Consequently, the principle was long since adopted, by all nations, that the ship must be condemned "out of her own mouth." She must be taken *flagrante delicto*. Certain broad, obvious tests were established which it was fatal to transgress. Thus, destination to an enemy port, apparent on the ship's papers, or inferred from their non-correspondence with her course, was a *sine qua non*. Unless such a destination, plain and obvious, existed, the ship was immune.

The effect of the Declaration is to destroy this immunity. Whatever the course, and whatever the cargo (with the exception of certain raw materials), the ship can be seized and brought to trial. It is useless to reply that if she is wrongly seized she may ultimately get damages. Theoretically, she ought to be satisfied. Practically, she will not. Courts are fallible—especially when they do not understand your language. Damages, though better than nothing, are seldom indeed satisfactory to plaintiffs. One might as well console the victim of a pickpocket by the reflection that the property in his watch is not divested by the thief.

In respect of "conditional" contraband, the Declaration gives away the rights of neutrals with amazing generosity. It establishes a so-called "free list," consisting of articles which no sane jurist ever considered could be treated as contraband at all. Having taken due credit for this feat, it concedes that a belligerent can declare anything else contraband if destined for the enemy's forces or State departments. This is an immense retrogression. The doctrine that provisions, fuel and the like, could ever be contraband has been strenuously and consistently protested against by every Power but ourselves. And in our hands it was strictly limited to provisions with a clear destination to a naval port. Even then, the trade was treated as an innocent one; the intercepted goods were paid for. Now it is proposed to revolutionise the practice. These innocent cargoes are in future to be confiscated, without a penny-piece of compensation—the ship is subjected to the same fate as if she were carrying dynamite and rifles. The destination may be to a civil, or even a neutral port; in neither case does the transaction get more than a bare presumption of innocence. It does not even get that if the port can be termed a "base." And the official commentary allows the port of neutral destination to be questioned.

In all these cases of highly controvertible facts, the Declaration allows the challenged ship to be destroyed, if that is "necessary" to the captor's operations. It is almost inconceivable that a barbarity which has never been committed in practice (the cases in which it was emphatically condemned by Lord Stowell were those of enemies' ships carrying licences)—should be expressly encouraged in the twentieth century. No research has unearthed the case of any neutral vessels having been so dealt with. But we are told that, bad as the Declaration may be, it is an attempt to mitigate in this and other matters the harshness which

certain Powers have expressed themselves as determined to adopt. Britain must compromise where she cannot persuade. This is really too humiliating, and too dangerous, an argument to need to be controverted.

If every novel claim which an autocratic chancellery likes to set up is to be the occasion of surrender, the authority of International law is obviously gone. It may not have much authority; all the more necessary is it to avoid weakening that which it possesses. But, after all, International law is not in such a parlous case. In this very Russo-Japanese war, which is supposed to demonstrate our danger under the present régime, did we not secure the release of the *Malacca*, and the stoppage of the *Peterburg* and *Smolensk* by H.M.S. *Forte*? What could be more distasteful to the Empire of Russia than the latter proceeding? Again, after our protests in the *Knight Commander* case, not a single further ship was sunk by the numerous Russian cruisers that kept the seas, except two for which immediate apology was made by Count Lamsdorff. Further back in history, we vindicated against Frederic the Great the right to capture goods in neutral vessels; to-day we are vindicating the freedom of the seas outside the three-mile limit. A firm appeal to the facts of history, and to the absence of precedent, will generally suffice to rebut novel extravagances. •

### Bismarck and Rice.—“Further Proof.”

The inconsistencies and contradictions into which those who deal with the question are led if they neglect the historical facts, are well exemplified by the case of Prince Bismarck. In two letters, written respectively to Kiel and Hamburg, he appears to have maintained the positions: (1) that rice was contraband in the Franco-Chinese war of 1885; (2) that saltpetre was not! As his reason for the latter statement was expressly given as being that

saltpetre was not directly useful for war, but needed to be worked up into gunpowder, it is hard to see why it does not apply to the case of rice, which needs to be worked up into bone and muscle before it can do much execution upon the enemy. The Chancellor's earlier letter remains inexplicable. "If rice is contraband," as Dr. Wharton observes, "everything is contraband." Whenever neutral trade could be supposed to be beneficial to the enemy (which is always), it could be interdicted as contraband.

One speaker, in advocating the Declaration, quoted Lord Stowell as saying that it was legitimate to seize provisions as contraband, without informing his hearers that the judge proceeded to observe that that right had been obsolete for the best part of a century! The same speaker represented an opponent as having advanced the ridiculous proposition that the Declaration conceded a right to belligerents to blow the most innocent ship on the most innocent voyage out of the water,—by the simple suppression of the context.

But perhaps the most extraordinary statement is that of the Foreign Office, when it represents the system of "further proof" as *unfavourable* to the neutral claimant. It is almost calculated to take away one's breath. For it is precisely this "further proof" which is accorded as an indulgence to claimants whose property would otherwise be condemned. It is never allowed to captors. When a ship is off her course, or undocumented, or her crew make contradictory statements, she (or her cargo) may properly be condemned. But it is then usual to allow her to excuse herself by "further proof." It is no doubt true that if all sorts of miscellaneous suspicions are in future to put the ship upon "further proof" to excuse herself, she will generally find such further proof a difficult matter. But under the established law, she cannot be asked for it. What must be thought of apologists who state, apparently with

conviction, that a ship might be safe enough, if it were not for the fatal possibilities of "further proof"? Yet this is what the Foreign Office tells us.

### **The Declaration of Paris in Danger.**

The true inwardness of the whole matter was laid open by a candid phrase of Lord Desart's in the course of the Lords' debate. His Lordship denied that precedents had any value, because "the whole situation had changed" since the Declaration of Paris. Of course the situation has changed, and the Declaration of Paris was meant to change it. If the statesmen who negotiated that declaration had meant that the law of contraband should be revolutionized in order to nullify their work, they could quite well have said so. The Declaration of Paris, in fact, was in advance of its time. It freed enemy goods in neutral vessels altogether. Ever since, the attempt has been made to frustrate it, by extending the scope and definition of contraband of war. Chase, C.J., began the work, by those decisions which, to quote Hall, "denaturalized the principle of continuous voyage, to cover acts of unfortunate violence." The attempt has now nearly reached fruition. What is extraordinary is that it is backed in England by all the forces of pacifism and cosmopolitanism which rejoiced in the promulgation of that very Declaration of Paris, which it designs to undermine. Well might Bagehot observe that the work of the wise in this world is to undo the consequences of the mistakes of the good!

### **Netherlands Jurists.**

Two works written in English by Dutch lawyers have reached us which are well worth attention. In the first, Dr. Lycklema à Nyeholt discourses with acute insight upon the problems of the Law of the Air. Like Mr. A. H. Kuhn of New York, the Authoress pronounces in favour of the

solution which lies in accepting the absolute sovereignty of the territorial State over the superincumbent column of air. We think she convincingly demonstrates that any other solution would lead to no greater freedom for aviation in reality, while it would certainly entail grave complications and dangers. It is very strange that at a moment when the recognition of old international easements is so difficult to obtain—as witness the Newfoundland Fisheries Arbitration—jurists should show themselves so eager to create a new one, and to lay down the doctrine of a servitude *transitus innoxii patiendi*. The great objection to such a servitude is that damage might very easily be done by passing air-ships, which could not be brought home to them. Articles accidentally dropped from a great height acquire an immense momentum by the time they reach the earth's surface.

Dr. Lycklema à Nyeholt has no difficulty in disposing of the superficial analogy drawn between the air and the ocean. The all-sufficient distinction between the two is this, that the force of gravitation acts downwards and not sideways. Nor has she any greater difficulty in overcoming the argument that by the Roman law, and, therefore, by the Law of Nations, "the air is free." What is meant by the Roman maxim is simply that the air is free in the sense that no action lies for abstracting it—not that the air-space is free to all comers: a notion which the Roman lawyers never contemplated. The influence of the maxim, as mistakenly interpreted, on recent juristic speculation, is a curious illustration of the servility of mankind to formulas. It should be added that Dr. Lycklema à Nyeholt gives a most learned and complete account of the labours of her predecessors in the field of aerial law, together with a full bibliography; and that she handles English authorities in a way that leaves nothing to be desired.

Dr. Singling's work is of a more popular character, and sketches in an interesting fashion the work of the two

Hague Peace Congresses of 1899 and 1907. The compatriots of Grotius have every reason to be proud of the continued efforts which such distinguished Dutchmen as Jitta, Asser, den Beer Poortugaël, and the writers of the two brochures above mentioned, are making to uphold the reputation of the Netherlands in this department of learning.

TH. B.

## VII.—NOTES ON RECENT CASES (ENGLISH).

THERE are no less than five cases relating to powers of appointment in the Law Reports of this year, and all of them are interesting, and two of them settle new points.

The first two refer to frauds upon special powers. *Cloutte v. Storey* (L. R. [1911], 1 Ch, 18) deals with the difference between powers operating at Common-law or by virtue of the Statute of Uses and merely equitable powers. An appointment in fraud of a power of the former kind is voidable only, while a similar appointment under an equitable power is, it is held, absolutely void. Accordingly, a purchaser for value without notice from the appointee, in the case of the former takes a good title, while in the case of the latter he does not. This no doubt is so; but is it therefore correct to say the appointment under an equitable power is absolutely void? The purchaser from the appointee does not take a good title as against those equitably entitled before him, simply because he does not get the legal estate, and so the rule that the first in time is the first in right applies. But surely the appointment is good until those equitably entitled dispute it? For instance, would the trustees be justified in refusing to pay over funds appointed by a father to a son, because they knew that the son intended using them for the payment of the father's debts?



*In re Cohen, Brookes v. Cohen* (L. R. [1911], 1 Ch. 37), decides that there is no need that the appointment for an improper purpose should be made in pursuance of a corrupt bargain to render it in law a fraud on the power. Whether this is altogether correct may be doubted, and it scarcely seems necessary to go so far in order to decide the point before the Court. There a testator by his will directed the trustees of funds, which he had a power to appoint among his wife and children, in case his own estate was not sufficient to pay his debts in full, to pay his wife out of such funds an annuity of £500, *so long as* she applied £400 of it to the payment of his debts. Surely, if the widow accepted the annuity, this would be a corrupt bargain—a bargain it is true with the dead, but just as much a corrupt bargain as if she had agreed to such a proposal made to her during her husband's life.

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It is decided in *In re Seabrook, Gray v. Baddeley* (L. R. [1911], 1 Ch. 151), that a general power of appointment by will can be executed by a will giving merely general bequests which the estate of the testator cannot satisfy: *sed quære*. In *In re Griffiths' Settlement, Griffiths v. Waghorne* (L. R. [1911], 1 Ch. 246), a testator "appointed" certain funds which were settled in trust for his children as he might appoint, and in default of appointment for himself and his executors, to pay his debts and subject thereto for his children equally. Joyce, J., held that the appointment must be treated as a bequest and was good although for purposes outside the power. *In re Master's Settlement* (L. R. [1911], 1 Ch. 321) decided that where funds were held for children in default of appointment the income was payable to the children equally until appointment was made. Why the point should need deciding passes human comprehension.

No doubt upon the authorities *In re Watkins' Settlement, Wills v. Spence* (L. R. [1911], 1 Ch. 1), is correctly decided; but it would be difficult to support it on the ground of common sense. A husband conveyed certain property upon trust to pay "out of the rents and profits" an annuity to his wife, and "subject thereto" for other purposes. The Court of Appeal, over-ruling Swinfen Eady, J., held that the words "subject thereto" made the annuity a charge upon the *corpus*. Surely this is in absolute contradiction of the express words of the settlement. Why "subject thereto" should be held necessarily to refer to *corpus* is hard to see.

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A rather curious case is *In re Hoyles, Row v. Jagg* (L. R. [1911], 1 Ch. 179), in which it was held that a mortgage debt is an immovable in English law, and so subject to the *lex rei sitae*. But in *British South Africa Company v. De Beers Consolidated Mines Limited* (L. R. [1910], 2 Ch. 502), it was held that a contract made in England for a mortgage in South Africa was subject to the equitable rule of English law as to clogs on redemption. It would seem, then, that foreign mortgages may be subject both to English and foreign law.

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The "one-man" company is well known to lawyers and business men. We have now the "one-man" meeting of shareholders. In *East v. Bennett Brothers, Limited* (L. R. [1911], 1 Ch. 163), all the preference shares were held by one person. No more preference shares were to be issued except such issue was sanctioned by an extraordinary resolution of the holders of the preference shares present at a "meeting" of such holders. The one holder consented to a new issue. Held, that the requirements of the memorandum had been fulfilled.

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Another curious case is that of *In re Whitfield, Hill v. Mathie* (L. R. [1911], 1 Ch. 310). There, before the passing

of the Deceased Wife's Sister's Marriage Act 1907, a widow married her deceased sister's husband. She was entitled to the income of certain property as long as she remained a widow. Of course, as her marriage was in law no marriage, she continued to enjoy this income after taking her brother-in-law as husband. Then the Act aforesaid made her relation with him a legal marriage. Did she thereby forfeit the income of the settled property? Parker, J., held that she did not. The Act was never intended to alter existing rights of property.

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The disinclination which all the Courts once showed to enforce contracts which tended to prevent a subject earning his livelihood, now seems to exist only in the Court of Appeal. *Woodbridge & Sons v. Bellamy* (L. R. [1911], 1 Ch. 326), following *Sir W. C. Lang & Co. v. Andrews*, (L. R. [1909], 1 Ch. 763), is another proof of this. There Eve, J., held that a solicitor who had given an undertaking not to practise within a certain district, broke such undertaking by writing from his office altogether outside this district to a person within it, demanding payment of a debt. The Court of Appeal unanimously reversed this decision, the Master of the Rolls saying, that if he had put a different interpretation on the undertaking he would have had to consider whether it was not void as contrary to public policy.

Persons beguiled, or in danger of being beguiled, by company promoters should note *In re London & South Western Canal Limited* (L. R. [1911], 1 Ch. 346). There some unfortunate persons had accepted shares from the promoter of a company to qualify them for directorships. They gave no consideration, and held them in trust for the promoter. When in due time the company was wound up, this fact was brought before Swinfen Eady, J., who ordered

them to pay the liquidator the highest value the shares had during the time they held them.

J. A. S.

The stimulated vigilance of the Inland Revenue authorities in gathering in unconsidered trifles, have brought before the Court two or three curious cases. *Strutt v. Clift* (L. R. [1911], 1 K. B. 1), and *Cook v. Hobbs* (L. R. [1911], 1 K. B. 14), both turn upon sub-sect. 3 of sect. 4 of the Customs and Inland Revenue Act 1888. With respect to the first-named case, there can be no doubt that where a trade cart is built specially to come within one of the exceptions to licence duty, it is displaced from the favoured exception if it is ever diverted to social uses; and there can be very little doubt that the owner who, living afar off, has delegated to another person his "power to prevent misuse" is properly visited with the consequences, although the misuse was without his consent, or even knowledge.

In the other case, the power assigned to the word "burden" to include not only merchandize carried in the cart, but the owner's wife travelling to market with him to help in the sale of the goods, is a reasonable, if uncomplicated interpretation of a word which might without some such meaning seem, in reading the section, to be a verbal superfluity.

*Cook v. Trevenner* (L. R. [1911], 1 K. B. 9) holds unavoidably that, under the Game Act of 1831, tame pheasants are game. The Game Act precludes anyone not licensed to deal in game, from buying game from any but a person who is so licensed, and a licensed person may not buy or sell, or keep in his possession, any game birds after ten days from the close of the shooting season. So the pheasant farmer is in a parlous state, for his time of business is the close season, and he must therefore not take out a licence or he

could not keep pheasants, and the fact of his being unlicensed, prevents anybody buying birds of him till the shooting season comes round again.

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The case of *Tolputt and Co. v. Mole* (L. R. [1911], 1 K. B. 87 and 836), is an important one in its way, as it decides that a solicitor, registrar of a County Court, may, notwithstanding sect. 41 of the Act of 1888, defend himself in person in an action against him in his own Court, and, if successful, recover such costs as a solicitor defendant is entitled to; and may then tax his own bill. But it is significant on quite another ground, as displaying what seldom reaches the public mind, the unstinted care and trouble taken by the judges in arriving at their decisions. Reference had to be made to the case of *London Scottish Benefit Society v. Chorley*, which was heard first by Denman, Manisty and Williams, JJ., ([1884], 12 Q. B. D. 452), and on appeal by Brett, M.R., and Bowen and Fry, L.JJ., ([1884], 13 Q. B. D. 872); and Brett, M.R., said, with reference to the Q. B. D. decision, "It seems to me that the head-note of this report accurately expresses the law." The head-note of the first case was adopted verbatim to the report of the appeal. It runs: "Where an action is brought against a solicitor who defends it in person and obtains judgment, he is entitled upon taxation to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly renders unnecessary." This head-note was subsequently enlarged by the County Court rules so as to apply likewise to the case of a solicitor who is plaintiff; for rule 25 of Order LIII provides that "where a solicitor who is plaintiff or defendant appears in person and is allowed costs, he shall be entitled on taxation to the same costs as if he had employed a solicitor," except in respect of items excluded by the ruling judgment. In the case of *Tolputt and Co. v. Mole*, it seems

to have been thought desirable to ascertain what were the particular items which were excluded in *London Scottish Benefit Society v. Chorley*; and the judges at the first hearing in their rare hours of leisure referred to and compared all the reports of the case, including the L. T. R., the L. J. R., and the *Solicitors' Journal*: and beyond that they seem to have had the office records searched, and finally to have sent to the defendant's firm for the minute information sought.

The enterprising claim of the plaintiffs in *Denaby and Cadeby Main Collieries v. Anson* (L. R. [1911], 1 K. B. 171), to moor for purposes of their business a coal hulk in Portland Harbour, drew from Buckley, L.J., the comment that it was "not only novel, but of a character which I will not go further than describe as courageous"; and from Moulton, L.J., a short and useful definition of the main essentials which would justify an interference with the sea shore, or the soil of a port, or the superjacent waters. As the land is the subject of rights of property, no permanent occupation of it or of the water over it can be lawful except by permission of the Crown or subject owning the soil. But there is a dominant right in the public to the free exercise of navigation and fishing and such acts as anchoring for those purposes, an interference with which would be a nuisance which even the permission of the owner of the soil would not justify.

Fletcher Moulton, L.J., has in the two cases of *Kitchenham v. Owners of ss. Johannesburg* and *Leach v. Oakley Street & Co.* (L. R. [1911], 1 K. B., 523), speedily had an opportunity of applying as a ruling case his judgment in *Moore v. Manchester Liners*, which was confirmed by the House of Lords (L. R. [1910], A. C., 498), and noted in our issue of February last, Vol. XXXVI, No. 359, p. 227. And it happens that these cases, both concerned with sailors returning to their ships, differ in their circumstances in a

manner which brings out the two issues, whether an accident, on account of which a claim is made under the Workmen's Compensation Act 1906, arises "in the course of" and "out of" the employment. From the decision of the Lords, the learned Lord Justice deduces the rule that it is settled that when a ship is in port, and a sailor goes on shore with leave, his employment is not interrupted; and if the risk is one due to the means of access to the ship, the accident arises "out of" the employment, but *contra* if the accident arises from something not specifically connected with the ship. But yet the dividing line is not when he actually touches the ship or the special means of access to it; and the Lord Justice suggests that if the returning sailor in trying to find the gangway in a dense fog fell into the water and was drowned, this would be an accident arising out of the employment. Any case must no doubt depend not only upon the facts, but of the view taken of them, and it is probable that in applying the leading case many subtle and minute distinctions will arise out of it.

In the late Mr. Justice Stephen's *Digest of the Criminal Law* the definitions tersely given of "larceny by a trick" and of "obtaining goods by false pretences" are, of the former, "the obtaining possession of property (as distinguished from the right of property) from the owner by fraud with intent to convert it; the thief obtains possession by a mistake caused by his own fraud"; and of the latter, "where one by any false pretence obtains from any other person any chattel, money, or other valuable security, with intent to defraud." In *Whitehorn Bros. v. Davison* (L. R. [1911], 1 K. B. 463) the Court of Appeal had occasion to consider the essentials of each of these offences; and the joint ruling may be thus summarised. The initial characteristic both of obtaining by false pretences and of larceny by a trick is, that the owner of the valuables is induced by a

fraud to part with the possession of them.' The distinction between the two is, that if the owner intends to pass, or to give the person to whom he has confided possession a power to pass, the right of property, it is false pretences. This of course is not theft. But if he does not intend to pass the right of property, or is by the person to whom he has given possession deceived with an *animus furandi* as to the identity of the person who is to be liable to him, it is larceny by a trick. In short, the deciding point is whether the owner intends to retain or to resign his right of property. As the plaintiffs were suing for the recovery of a valuable necklace which they entrusted on an "approbation note" to a person who assured them that he had a customer for the necklace, but who pawned it with the defendant, they of course sought to prove larceny by a trick. But in this they failed, as the Court held that the approbation note formed a contract, and that a power to transfer the ownership to a purchaser was given to the dishonest intermediary. But the case develops other matter of considerable interest, for after the date of the pawning this person purchased of the plaintiffs, by giving them bills (dishonoured at maturity), the necklace which he had already parted with. And the purchase thus curiously made was held to confirm so far the defendant's title. The only chance of success remaining to the plaintiff was to show that the advance on the deposited necklace had not been made in good faith and without notice of the pawnor's fraud. Here another complication arose, for the jury in the Court below had found that the defendant did not take the pawn in good faith and without notice. And a further complication was, that they had been misdirected by the judge that the onus of proof of good faith was on the defendant. These circumstances the Court held, not only called for a new trial, but in the opinion of the majority were sufficient to require judgment to be entered for the defendant.



## SCOTCH CASES.

The Valuation Appeal Court has followed *The Shoreditch Case* and reduced the valuation of licensed premises in consequence of the effect on them of the recent Finance Act. The Court had also to consider the effect of the Finance Act on the liquor trade in another respect. In *The North British Distillery Company v. The Assessor for Edinburgh* ([1911], 1 S. L. T. 145), the appellants carried on the business of distillers of spirits within the premises, the assessed value of which was in question. For a number of years the value had been entered without objection at £6,960. The Finance Act, however, imposed a licence duty which for the first time fell to be calculated on the quantity of proof spirits distilled, and, in the appellant's case, had the effect of their having to pay £1,205 more than in the previous year. The Valuation Committee declined to allow the appellants any deduction in respect of these circumstances, and the appeal was consequently brought. The Court refused the appeal. They were of opinion that the decision in *The Shoreditch Case* had no bearing on the question, for in the case of a public house it is the premises that are licensed, and have an added value so long as licensed, whereas the appellants had a licence to manufacture spirits, restricted no doubt to the premises in which they carried on their business, but they could not be refused such a licence if they removed to other premises. The possession of a licence by the manufacturer does not give any added value to the heritable premises in which he carries on business. As Lord Salvesen put the matter:—"The truth is that the licence duty here in question has no relation to the heritable subjects at all, although it may affect the profits of the appellant's business. The same result might quite conceivably happen in the case of an import duty

“being levied on such grain as is used in distilleries, but I cannot conceive that the valuation of a heritable property used for business purposes is to fluctuate with the profits derived from the business.”

By the law of England no action for slander is competent unless there is publication of the libel to a third party, whereas in Scotland no publication is necessary. In *Thomson v. Kindell* ([1910], 2 S. L. T. 442) a libellous telegram was despatched from London to a commission agent in Glasgow. The defender pleaded, in defence to an action for damages, that delivery of the telegraph form at the post office in London and transmission by the postal authorities did not constitute publication, but the Lord Ordinary held that the law which determines the question whether a telegram passing between two countries is or is not slanderous is that of the country where the telegram was delivered, and the telegram being delivered in Scotland, where publication to a third party is not essential to the completion of a libel, an issue was allowed for the trial of the case.

The important case of *Crookston Bros. v. Furtado* (2 S. L. T. 343) raised the question whether a foreign company, whose head office was in Paris and whose business consisted in working phosphate mines in Algeria and selling the produce, was exercising a trade in the United Kingdom within the meaning of the Income Tax Acts. The Court answered the question in the negative. It is not improbable, however, that the Crown may carry the case further, and therefore it is interesting to see what were the circumstances which distinguished the case from the well-known series of precedents to the contrary effect. In *Erichsen v. Last* ([1881], 8 Q. B. D. 415), what turned the scale in favour of the Revenue was that the foreign company had a London office with a whole time representative through

whom they habitually received money for work done in this country. *Tischler & Co. v. Apthorpe* ([1885], 2 T. C. 89) decided that if a partner of a foreign firm spent four months every year in England taking orders, and the firm also had general agents in England collecting accounts, and rented a room in their agents' office, such firm was exercising a trade in England. In the case of *Pommery & Greno v. Apthorpe* ([1886], 2 T. C. 182), the foreign company had a whole-time representative, and their name along with his was exhibited on his premises, and—what was considered a decisive factor in favour of the Crown—the agent had a stock from which he supplied small customers. Also the agent collected accounts. Similarly, in *Werle & Co. v. Colquhoun* ([1888], 20 Q. B. D. 753), the agent was sole representative, the foreign merchant's name was on his office, the agent had custody of a stock for supplying customers, and he received payment of accounts, and these circumstances brought the foreign trader within the scope of the Act. The same result was arrived at in *Watson v. Sandie & Hull* (L. R. [1898], 1 Q. B. 326) and *Turner v. Rickmann* ([1898], 4 T. C. 25). In the former, goods were consigned to an English firm for sale on commission, the English firm selling in their own name and receiving the proceeds. In the latter, the contracts for sale of the goods and delivery of same were all made in England. These are the leading authorities in favour of the Crown. It is instructive to note how, in the case of *Crookston Bros. v. Furtado*, the effect of these and other decisions was avoided. We shall just briefly enumerate the circumstances which weighed with the Court in holding that the foreign company was not trading in the United Kingdom:—(1) Head office in Paris, with banking and general business transacted there; (2) Mines in Algeria; (3) No office or clerical staff here; (4) Name not exhibited on any door, window or the like, or appearing in any directory; (5) No stock

of goods in this country; (6) All deliveries of goods made out with the United Kingdom, the bills of lading being sent from Algeria by post and endorsed to the purchasers while the cargo was at sea; (7) The home agents also agents in other commodities; (8) The agents not liable for bad debts; (9) The agents remunerated by commission; (10) The agents contracted on behalf of a known principal; (11) Goods were paid by cheque on London in favour of the foreign Company, purchasers being directed to forward these cheques to Crookston Bros. in Glasgow, who sent them to Paris as received, where they were handed over for collection to the Company's bankers there; and (12) The agents' commission and cash for outlays were remitted to them direct from the Company's head office in Paris, and necessarily so as the agents never fingered the price of goods sold at all.

Of all these elements, the most important certainly is that the Company did not receive either direct or through its agents payment in this country of the price of the goods in which it traded, for as Cockburn, C.J., said in *Sully* (2 T. C. 149), a merchant exercises his trade in the place where his profits come home to him. But the other facts also had their effect in influencing the Court to the conclusion reached, and it was the cumulative effect of the whole circumstances that brought about the decision.

### IRISH CASES.

There is, of course, no doubt about the ordinary general rule that where a person in a fiduciary relation towards another makes a purchase from that other, the *onus* of showing that the transaction was in all respects equitable rests on the former. *Patten v. Hamilton* [1911], 1 I. R. 46, adds nothing to that principle except a discussion as to whether lapse of time may shift that *onus* or not, and a

decision that in the circumstances it had not been shifted. In 1841, an agent had bought up a charge on the estate of his principal at an under-value, and in his accounts to the principal of the rents received, the agent debited the principal with interest on the full face-value of the charge. The Court held that the presumed legal result of such a transaction, as between principal and agent, would be that the agent should be treated as a trustee for the principal, and that the extra interest (*i.e.*, the interest on the amount by which the face-value of the charge exceeded the amount paid by the agent) should be applied towards the extinguishment of the charge. That presumption could be rebutted by evidence showing that the principal, after full disclosure of the circumstances, consented to the agent retaining the benefit of the transaction for his own use. There was no evidence as to this, on either side, in the present case. But it was suggested, on behalf of the representatives of the agent, that after so long a time as had elapsed here, the burden was shifted to the representatives of the principal when it was sought to challenge the transaction. This suggestion, however, the Court rejected, replying that it was "not asked to set aside any transaction, but only to give legal effect to what was actually done."

A *dictum* in *May on Voluntary Conveyances* (3rd edition, p. 42), is borne out by the decision in *In re Kelleher* ([1911], 2 I. R. 1). An application to set aside a voluntary deed as being in fraud of creditors, was made at the instance of a creditor whose debt came into existence after the date of the deed. All creditors existing at the date of the deed had been paid off. There was no evidence of any express intention to defraud creditors. In these circumstances, it was held that the deed should not be set aside at the instance of such a "future" creditor. It is, of course, admitted that even in the absence of an express intent to

defraud creditors, if the result of the transaction be to deprive the debtor of all property wherewith to pay existing creditors, the Court must infer or imply an intent to defeat them. A voluntary settlor is, in fact, presumed to intend the natural consequences of his act. But this principle of implying the intent from the result is confined to the case of creditors who were such at the date of the settlement. The damage to the future creditor is, to drop again into Common-law language, too remote.

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“Eldest son,” in conveyancing language, practically means a child who, in the events which happen, takes settled property under the limitations of the settlement. *L'Estrange v. Winniett* ([1911], 1 I. R. 61), is a case in which the mysterious process of our real property law made of a younger daughter an “eldest son,” and of an elder daughter a “younger child.” These curious-seeming results came about simply enough. A settlement of 1843 gave lands to L. for life with remainder (in the events which happened) to his female issue as he should appoint: it also gave L. a power to charge the lands with £3,000 as a provision for his younger child or children. In 1850, he, by his marriage settlement, charged the lands in favour of the younger children of his then intended marriage “other than an eldest or only son.” There were no sons of the marriage, but two daughters, and L. exercised his power of appointment under the settlement of 1843 by appointing the lands over which he had power to his younger daughter. She having thus taken the lands under the limitations of the settlement, came into the position of an eldest son, and therefore, it was held, could not take under the charge in favour of younger children. But could the elder daughter take under it? An argument suggested that the settlement (of 1850) pre-supposed that there should be a male capable of taking, and that only

in that event did the charge arise: and there is authority for saying that the words "*besides* an eldest or only son" require the existence of a son to give them any operation (*Flemyng's Trusts*, 15 L. R., Ir., 363). However, on the words in the present case, the Court held that the existence of a son was not required to bring into operation the provision of the charge for younger children, and that the elder daughter, being unprovided under the limitations of the settlement, took under this provision.

A suggestion of Chitty, J., in *In re Mundy & Roper's Contract* ([1899], 1 Ch. 296), is hardened into a decision in *In re Bruen's Estate* ([1911], 1 I. R. 76). The Settled Land Act 1882, by sect. 50, provides that the powers given by the Act shall not pass to a person as being, by operation of law or otherwise, assignee of a tenant for life, but remain exerciseable by the tenant for life after any assignment. Now, lands are settled on A. for life, and then on B. for life, with remainders over; A. assigns his life-estate to B., so that the former is merged in the latter—who can exercise the Settled Land Act power of sale, A. or B.? "It may be," Chitty, J., had said in the case above-mentioned, "that the power (of the first tenant for life) is gone under the doctrine of merger": and Wylie, J., in the present case, says "it is." Therefore B. can sell: the result of the assignment here was to extinguish the first life-estate and accelerate the second: and B. became the tenant for life "for the time being," in the language of sect. 2 of the Act of 1882. The question was of more than merely academic importance in the present case, as it was the case of a sale to tenants under the Land Purchase Acts, and the answer involved the destination of the "bonus."

## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES]

*The Marriage Laws of the British Empire* By W P LIVERSLEY and W F CRAIGS London Stevens & Haynes 1910

In this work, all that appertains to marriage throughout the British Empire has been set out. Mr Liversley has dealt with the law of England and Ireland, and Mr Craigs is responsible for the law of Scotland and the British Possessions and Protectorates. The text shows a careful study of the various laws governing the dissimilar conditions existing in various parts of the British Empire. British Possessions are divided into two classes: (1) Planted colonies where the English law forms part of the original law of the settlers, or has been formally declared to be the basis of Colonial law, (2) Conquered or ceded possessions in which the law of the original inhabitants or settlers has been retained with or without modification. In a work of this wide scope it is natural to expect errors and omissions, but one finds only a few grounds for criticism in the treatise under review. When Mr Craigs speaks of possessions acquired from the Dutch, he says, "In these possessions, questions on the law of marriage, not settled by local Act or ordinance, must be solved by reference to the Roman Dutch law *so far as applicable to colonial conditions*." In South Africa certainly the Roman Dutch Common law is applicable, but with modifications *not* based upon colonial conditions. Again, on page 293, we find a statement that sect 9 of the Marriage law of 1871 was repealed by Proclamation No 40, 1901. The correct number is Proclamation No 34, as previously stated, whereas No 40 has to do with *Lotteries*. Can it be that Mr Craigs has perpetrated a subtle jest at the expense of matrimony in general and the re-marriage of widows and widowers in particular? With these minor criticisms the book may safely be commended to lawyers throughout the Empire, as giving, in a compact and accurate form, the Marriage laws existing in our numerous possessions.

*Accidents in their Medico Legal Aspect* Edited by DOUGLAS KNOCKER London Baillicie, Tindall & Cox 1910

Mr Klocker edits this very substantial volume, which is intended for the benefit of both lawyers and doctors, and contributes, mainly



for the benefit of the latter, the legal part, which claims to give medical men a short statement of the law on matters of interest to them. The main part of the book is the medical part, which seeks "to establish some sort of standard by which we may test the accuracy of medical evidence in accident cases," and "to assist the lawyer to understand the consequences of an accident to the part of the body alleged to have been injured, and to help him to follow the medical witnesses when they deviate slightly from the beaten track." The medical contributors are all gentlemen of the highest qualifications, and experts in their own subjects. The titles are arranged alphabetically, and each begins with a head-note, followed by a glossary of technical terms, then, if it is a part of the body that is described, comes the anatomy; then the consequences of accidents and diseases produced by accidents. The next headings are Operation, Cure, Return to work, Recurrence, Occupation Diseases, Diagnosis, and the difficult subject of the Malingerer. This short summary will give an idea of how each subject is treated. The titles range from Abdomen to X Rays. The subjects are further explained by a large number of carefully executed plates and diagrams. The third part consists of a case guide, arranged alphabetically under the same headings as the medical part, and giving short epitomes of cases where injuries occurred, or were said to occur, to the various parts of the bodies through accidents. We must not forget to mention that there is a very complete Index. The idea of the work appears to be an excellent one admirably carried out.

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*The Laws of England.* Vols. V, and XI—XIV. By the EARL OF HALSBURY\* and other Lawyers. London: Butterworth & Co. 1910.

The fifth volume of this great series makes a somewhat belated appearance, but there are several good reasons to account for this. The whole volume is devoted to the very important subject of Companies, on which it constitutes a complete and exhaustive treatise in 1394 paragraphs. As there was only one heading in the volume, the preparation would naturally take longer than if it could have been proceeded with simultaneously on several headings. The necessity of including the recent Consolidation Act and the Assurance Companies Act also added to the delay. The value of this volume can be readily understood, when it is noted that the

bulk of the work has been done by Mr. W. F. Hamilton, K.C., and Mr. Frank Evans, assisted by Mr. W. A. Bewes, LL.B., and again revised by Mr. T. H. Carson, K.C., and finally by Mr. Justice Swinfen-Eady. Volume XI is not so homogeneous a volume, and includes five titles. The first title of Descent and Distribution is contributed by Mr. W. F. Hamilton, K.C., LL.D., and Mr. P. Tindal Robertson. It is a short one of only 31 pages. In this volume, it may be roughly said, the titles get longer and longer. The title Discovery, Inspection, and Interrogatories is by that well-known authority, Judge Bray, and Mr. R. E. Ross, LL.B., and covers a little under 80 pages. Distress is treated in about 110 pages by Judge Willis, K.C., Mr. J. H. Redman, Mr. S. Moses, M.A., and Mr. Berthold Adler. The next title, Easements and Profits à Prendre, is by Mr. A. F. Topham, LL.M., and Mr. R. G. Nicholson Combe, M.A. It is about the same length as the last one. The last, the longest, and probably the most important title, is Ecclesiastical law. This is contributed by several learned gentlemen, headed by two Chancellors of Dioceses. Dr. Tristram, K.C., D.C.L., an Ecclesiastical lawyer of prominent learning and experience, heads the list, followed by Chancellor P. V. Smith, M.A., LL.D., Mr. B. Whitehead, Mr. G. M. Edwardes Jones, M.A., Mr. A. Romer Macklin, LL.B., and Mr. H. S. Q. Henriques, B.C.L. The title covers nearly 500 pages and comprises over 900 paragraphs. The wideness of its scope can be seen by the definition given in the Introduction of the title. "Ecclesiastical law is here taken to include the law of England administered by the Courts of the country so far as it relates to any particular Church, whether established or not, or the members thereof as such, or to any spiritual or ecclesiastical officer as such, or to any property which is an ecclesiastical charity."

Volume XII has not a large number of subjects but they are all important ones. These are, Education, Elections, Electric Lighting and Power. Education is treated by Sir W. Anson, M.P., M.A., D.C.L., and Mr. R. Hills, assisted by Mr. C. T. Carr, LL.M. Elections, which is a long title of over 400 pages, is by Mr. E. A. Jelf, M.A., Mr. R. S. Nolan, and Mr. W. G. Courthope, and has the additional advantage of an introduction by Sir Arthur Jelf. The last title on a highly technical subject, Electric Lighting and Power, is contributed by such experienced and competent writers as Mr. Balfour Browne, K.C., and the late Mr. A. F. Jenkin.

Volume XIII consists of four articles. The first, on Equity, is

entirely by Mr. J. M. Lightwood, who gives his subject 175 pages. The second title strikes us as one of great value, being on the very difficult subject of Estate and other Death Duties. The contributors have very high qualifications for dealing with their subjects, being Mr. A. W. Soward, Secretary of the Estate Duty Office, Somerset House, assisted by Mr. A. E. Sansom and Mr. A. J. H. Green, both of the Estate Duty Office. Their special knowledge is invaluable, and our only fear would be that they might have an unconscious bias in favour of their Department. The interesting subject of Estoppel was contributed by the late Mr. Justice Walton, whose loss we are lamenting, the Hon. J. W. Mansfield, M.A., and Mr. B. W. Devas, M.A. The last article, and an important one, is Evidence. This is a wide subject, and one connected with so many branches of law that we are doubtful whether it can be successfully included in a work of this nature, but, at any rate, a very thorough attempt has been made by the large number of writers, consisting of Mr. W. G. Hume-Williams, K.C., M.P., LL.D., Mr. S. L. Phipson, M.A., Mr. J. R. V. Marchant, M.A., Mr. A. C. Lawrence, Mr. M. L. Gwyer, M.A., B.C.L., Mr. H. G. Robertson, and Mr. W. A. Greene, M.A.

The fourteenth volume includes a good many headings, though some of them are comparatively short and unimportant. The most important seem to us to be Executors and Administrators, by Mr. A. H. Jessel, K.C., and Mr. W. L. Selignan. Other useful articles are those on Factories and Shops by Mr. J. V. Vesey Fitzgerald, K.C., and Mr. C. M. Knowles, M.A., LL.B.; Execution by Mr. C. Johnston, assisted by Mr. S. E. Pocock, LL.B.; and Fisheries by Mr. H. Stuart Moore, M.A. There are short but valuable articles on Explosives by Sir K. E. Digby, K.C., G.C.B., Major A. Cooper Key, H.M. Chief Inspector of Explosives, Captain M. B. Lloyd, and Mr. A. H. L. Leach; on Extradition by the Rt. Hon. Sir Edward Clarke, K.C., and Mr. E. P. Clarke; on Family Arrangements by Mr. Martelli, K.C., M.A., LL.D., and Mr. J. Chadwick, LL.B.; and on Ferries, by Mr. R. Ringwood, M.A.

In order to keep the work up to date, a Supplement has been published of Vols. I—XII, which contains the latest law up to November last, and is arranged on a simple and practical system. All future Supplements will be cumulative, so it is hoped that the treatise will always be complete.

*Extradition: The Law Relating to Fugitive Offenders.* By Sir F. T. PIGGOTT, M.A., LL.M. London: Butterworth & Co. 1910.

It is always a grateful task to review Sir F. T. Piggott's books. The present volume closes the comprehensive survey of the field of conflicting jurisdictions which the learned Author several years ago undertook. It is marked throughout by the great subtlety, conspicuous fairness, and extreme ability which could not be absent from anything Sir Francis might produce. He passes from general philosophic considerations to the monumental report of the Royal Commissioners of 1878 (Cockburn's), and then proceeds to deal with the Acts of 1870, 1873, 1895 and 1896, and with the Treaties in detail. The treatment of the vexed question of "political offences"—which, as he remarks, is not the phrase used in the Act ("offences of a political character" being preferred)—is exceedingly able. The Author shows that they include "not only such offences as are in their nature political, but also ordinary crimes which are committed with political intention." The provision was an afterthought, and does not occur in the earlier Treaties with France, Denmark, and the U.S.A. It seems that in *R. v. Ganz* (9 Q. B. D. 93), the question was raised whether the subject of a third Power could lawfully be extradited. But that case was decided on an old Anglo-Dutch Treaty, which in terms applied only to "subjects of the two contracting powers." Even so, it was by a bold construction that the phrase of the statute—"foreigners.....assimilated to subjects" was held by the Court to cover all foreigners in the territory of those powers. (Probably the phrase only meant licensed residents, "denizens," and the like). The grave issue was not raised, whether a Power has any international right to surrender to another Power the subjects of a third State. We are not concerned to minimize the authority of the Territorial State: but the assertion that it can deliver up the subjects of another for no proved crime whatsoever, seems to require examination. Sir Francis, however, approves the extradition of Ganz, and does not think there is any substance in the contention, that, as an American, he was not within the Treaty. There is perhaps, some inconsistency between the praise of the Act of 1870 in the Preface, as "a monument of successful draftsmanship," and the reference on page 81 to "the scrappy way in which the Act is drafted." The praise arises mainly from the fact that only about 70 reportable cases have been argued upon the Act; but it deals with a very special subject, and cases of extradition are

not very numerous; nor are criminals as a class well provided with the means of litigation. The Author has a useful note on the very obscure topic of the effect of a foreign judgment as ground for a plea of "*autrefois acquit*" or "*convict*." The vital point of the correspondence of English and foreign definitions of particular crimes, is fully and clearly dealt with. Colonial legislation is also taken into account; and the latter half of the volume contains the complete text of the treaties and legislation—a most valuable feature of an indispensable work.

*The Visigothic Code (Forum Judicum)*. Translated by S. P. SCOTT. Boston, U.S.A.: The Boston Book Co. 1910.

Spain was a portion of the Roman Empire until the Romans were displaced by the Visigoths. The barbaric dress and habits of the conquerors must have caused considerable disgust in the minds of the polished, luxury-loving decadent Romans. The original Visigothic laws were based upon oral tradition, and it was not until towards the end of the fifth century that they were reduced to writing by Euric, who lived in the city of Arles. The Visigothic code is a mixture of the writings of Euric and the *Breviarium Alaricianum* promulgated by Alaric II, the latter based very largely upon the codes of Justinian and Theodosius. The code itself is wonderfully complete and comprehensive, but what strikes the reader most forcibly is the curious mixture of civilisation and barbarism reflected in it. Erudite laws for the punishment of crime are sandwiched in with intolerant denunciations of the Jews and their religion. Torture, scalping and scourging, are frequently dwelt upon with considerable gusto. The Mosaic law of *lex talionis* comes next to the mild punishment of a cleric by penance for adultery. Much of the code exists to-day in the law of Spain and Portugal. The code is divided into (1) The oldest law based upon the unwritten observances of ages; (2) Antiqua, or law derived from Roman sources; (3) The Edicts of Kings; (4) The Acts of Ecclesiastical Councils. Much of this system of law will be familiar to students of Roman and Roman-Dutch law; still a great debt is due to Mr. Scott for the trouble he has taken in translating, from the curious dog Latin, and in editing, this monument of a most interesting period of history. The Preface gives the reader an excellent bird's-eye view of the history of this wonderful race before they conquered Spain and Gaul, their subsequent development and downfall, together with a lucid account of their customs and habits.

*The Lord Chancellors of Scotland.* 2 Vols. By SAMUEL COWAN, J.P. Edinburgh and London: W. & A. K. Johnston. 1911.

This is a very interesting history of the Lord Chancellors of Scotland, from the date of the institution of that office in 1124 down to the time that they ceased to be appointed, namely, in 1708, the year of the Act of Union. This work shows great erudition, and a careful survey of ancient authorities. In the Preface the Author makes the following statement, which is somewhat startling to lawyers who are interested in historical research. "Some of the Catholic Bishops and Archbishops made very good Chancellors, but the office was really one which was outside their profession altogether." Mr. Cowan must have forgotten that in mediæval times the study of the law was part of the curriculum of the clergy of the Catholic Church. The Chancellor was, and is now, keeper of the king's conscience, and who more fitted to perform this duty than a cleric? In England for many years law was expounded and administered by the clergy. On the Continent the same held good, for instance in Holland, the clergy claimed the sole right to draw wills and other legal documents, and were the forerunners of the present day notary. The most fascinating portion of the book is that part which deals with the lives of the chancellors in the time of the unfortunate Mary Queen of Scots. Men of the transcendent ability of Cardinal Beton; the dominating personality of George Gordon, fourth Earl of Huntly; and James Douglas, Earl of Morton, of whom Spottiswoode the historian truly said, "Never was there seen a more notable example of fortune's mutability than the Earl of Morton," and lastly, the faithful George Gordon, fifth Earl of Huntly, who died in 1576, broken-hearted at his failure to rescue his royal mistress. This and more besides makes fascinating reading of a most sensational period of Scottish history. Both volumes are well supplied with portraits, beautifully executed.

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*The Comparative Law of Marriage and Divorce.* Under the general Editorship of A. WOOD RENTON and G. G. PHILLIMORE, B.C.L. London: Sweet & Maxwell. 1910.

This volume is reprinted from Burge's *Commentaries on Colonial and Foreign Law*. In a work of this description, embracing as it does the laws of so many countries, errors are bound to creep in. Dr. Bisschop, one of the Assistant Editors, is an

eminent authority on Roman-Dutch law, but a cursory study of the result of his labours shows two rather astounding mistakes. On page 95 it is stated that, "In the Transvaal a widower may not remarry within three months after his wife's death, nor a widow within three hundred days after her husband's death, unless special dispensation has been obtained from the Government." This is sect. 9 of Law 3 of 1871 which was, however, expressly repealed by Proclamation 34 of 1901, so that it is unnecessary to say that it is no longer the law in the Transvaal. On page 826 we find it stated, in reference to divorce on the ground of malicious desertion, that "In the Transvaal the former practice of two separate actions is followed." This again is contrary to fact, as is expressly laid down in Rule 62 of the Rules of the Supreme (now Provincial) Court of the Transvaal, governing actions of this nature. It has always seemed to the writer of this notice to be a misnomer to state, that malicious desertion is a ground for divorce in Roman-Dutch law, although the learned Authors are in excellent company when they make this statement. Malicious desertion is a ground for an action for restitution of conjugal rights, and it is the failure of the person ordered by the Court to restore those rights by a certain date that is the ground for the right to a decree of divorce. We also think that the statement that lifelong imprisonment and condemnation to death, etc., amount to malicious desertion is somewhat too positive, as Maasdorp, who is an exceedingly high authority, does not put it higher than that they "*might*" amount to malicious desertion, and certainly we know of no case decided on the point in South Africa. Moreover, the authorities cited by Maasdorp, *i. e.*, Van der Linden and Van der Keessel, both base their *dicta* upon a decision of the former, who in turn is supported by one previous case cited in *de Groot Plac. Boek*, d. VI, p. 540. Of course, these are criticisms which may only apply to the Roman-Dutch law part of the book and not to the others, but in a work which rightly has, and will continue to have, such a world-wide circulation, too much care cannot be exercised in the cause of strict accuracy. The Index is particularly good and is an illuminating key to the text. As this is to be published as a separate treatise, we think the learned Authors might consider the advisability of rearranging the scheme of the text in future editions. Speaking generally, there is no doubt that a tremendous amount of erudition and research has been expended in compiling this really most useful and commendable work.

*Local Government 1910.* By ALEXANDER MACMORRAN, K.C., M.A., and K. M. MACMORRAN, M.A., LL.B. London: Butterworth & Co. 1911.

This work professes to cover the whole Local Government legislation and practice for the year 1910. It is the second volume of a series intended to appear periodically. It contains over 500 pages, so the bulk of the work, to contain full information on this one subject alone, may be expected soon to reach very formidable dimensions. The book consists of a series of headings in alphabetical order, dealing with every subject which can be considered to be even remotely connected with the scheme of Local Government, and with some which to ordinary minds have nothing to do with it, e.g., betting and jurors and jury lists. Under these headings are set out the sections of all the statutes passed last year dealing with the subject-matter; then (2) orders, circulars and memoranda, issued by the various Government Departments which exercise control over these various matters; (3) statements of the effects of reported legal decisions; and (4) decisions of the Local Government Board. In some instances, answers given by Ministers to questions in Parliament are also set out in full. To persons who wish to have access to all these sources of information, and who are able to decide for themselves how far the various *dicta* and decisions set out are likely to be binding as precedents in future cases, a book like this may be of use. To practitioners who have to advise on legal points, the mass of undigested information which is here collected will not be a boon. The Index is voluminous but does not always readily put the inquirer on the track of what he wants to find. The book is of course full of opinions and decisions, for instance, given by the Local Government Board, the Board of Agriculture, and the Board of Trade; but the Index gives only one reference to Local Government Board, three to Board of Agriculture, and does not mention the Board of Trade at all. The Development and Roads Improvement Act of last year, and the orders dealing with the matter, are set out in the text, but no reference appears in the Index under the heading either of Highway or of Road. The Table of Cases gives each case twice over, under the name of the defendant as well as that of the plaintiff, so the number of decisions is not quite so formidable as at first sight it might appear to be.



*A Summary of the leading principles of the English law of Contract.* By T. RADFORD POTTS, D.C.I. Oxford: Hubert Giles. 1911.

This is a new venture on the exposition of the law of contract. The Author quotes the lofty but disquieting maxim of Coke, that we should bring the reason of the law so to our reason that we perfectly understand it as our own; and his aim is the difficult one of achieving a book on a very complicated subject which a beginner can understand without the aid of a teacher, and, what is still more comprehensive, without the need of reference to other books. Of course the volume is academic, for it comes from a very academic city; and it is also elementary, but that is the chosen plan of the writer: and even a Lord Chancellor must, when he was on the threshold of becoming an apprentice of the law, have needed guidance in the elements the final applications of which the Fates ordained that he should expound. The Author, from his position in the University, must have had special experience in the perplexities of a novice; and his treatment of his subject, as might be expected from his insight, seems well adapted to his design, and to the approximate attainment of Coke's exalted requirement.

*The International Law and Custom of Ancient Greece and Rome.* By COLEMAN PHILLIPSON, LL.D., Litt.D. London: Macmillan & Co. 1911.

As Sir John Macdonell observes, in his Introductory Note, these volumes "give that which is to be found nowhere else." They are convincing proofs of the erroneousness of the popular view that International law began with Grotius. The learned writer shows immense learning and research, not only among the principal classical authors, but also among the secondary authors and the various collections of Greek and Roman inscriptions. The bibliography is complete. Dr. Phillipson points out that the Greeks came more nearly than did the Romans to a theory of International law. They had more reason to do so. They were the Many not the One, many equal communities not one huge centrally-governed empire. For special commendation may be suggested the treatment of *jus gentium* and the college of fetials as a kind of embryo Hague tribunal. The three cases in which Gaius compares Roman law with foreign systems might have been mentioned, and among the

authorities Professor Ernest Nys. Nor is Mr. Warde Fowler named, though there is a chapter on the City-State.

*The Charters of the Borough of Southampton.* 2 Vols. By H. W. GIDDEN, M.A. Southampton: Cox & Sharland. 1909-10.

These two volumes are published by the Southampton Record Society, a body which is performing a voluntary duty of national interest. The work traces from Roman times the rise of the town of Southampton, and that town was destined from its position to more than ordinary importance. The first actual mention of the place seems to be in the *Anglo-Saxon Chronicle* in A.D. 755; but its charters are, it is claimed, so rich in material, "as to be almost unique in the records of English boroughs." Certainly they are fascinating reading. The earliest dates from the first year of John. This is hung in the Town Clerk's office. The latest is in the last year of James II, just before he quitted the kingdom. The originals are given verbatim with a translation on the opposite page. This is a great advantage, for owing to the many abbreviations in early MSS., it is not easy for an ordinary scholar, unaccustomed to such transcripts, to follow either the Latin or the Norman French. One regret may be expressed, viz., that the edition is limited to two hundred copies.

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*Marriage and Divorce.* By CECIL CHAPMAN. London: David Nutt. 1911.

This little treatise by Mr. Cecil Chapman, the well-known Metropolitan Magistrate, is the first of a projected series called "the Woman Citizen Series." All who know Mr. Chapman will understand that the work is characterised by much earnestness, and shows a thorough knowledge of the history and literature of the subject. We should imagine that he has been primarily influenced to study the subject carefully by his professional knowledge of the misery of many married lives, and his well-known views on the equality of the sexes. Interesting sketches are given of the history of marriage and divorce, and the Author struggles against what he calls the "Sacramental dogma," and criticises the present marriage service of the Church largely because it is based on "sex inequality." We must refer our readers to the book for most of his conclusions, but he would have all marriages civil, to be followed by a religious

ceremony if desired : he would extend the grounds of divorce, and make them the same for both husband and wife, and would give powers to develop separation into divorce after a certain time, according to circumstances. Mr. Chapman deals as fully as is consistent with the scope of his work with the theological objections, but some of the arguments are so subtle that we fail to follow them. The argument of greatest weight seems to us to be derived from Mr. Chapman's wide experience of the existing evils sanctioned by and springing from our present Marriage law.

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*The Annual Digest 1910.* By JOHN MEWS. London : Sweet & Maxwell. 1911.

*Butterworths' Yearly Digest 1910.* By H. CLOVER. London : Butterworth & Co. 1911.

The modern lawyer is largely dependent on the Digests for his Case-law, and so well known are the two under review, that it is unnecessary to say much of them. In *Mews* are to be found all the reported decisions of the Superior Courts, including a selection from the Scottish and Irish. A duplicate of the List of Cases Followed, Not Followed, Over ruled, etc., is conveniently printed on one side only, to facilitate cutting up, for "noting-up" purposes.

Very ornamental for a law-book is *Butterworths' Yearly Digest*, in its red cover. This is the third yearly Supplement of the *Ten Years' Digest*, and contains the Cases decided in the Supreme and other Courts, besides a selection of Irish and Scotch cases. Mr. Clover, the Editor, calls attention in the Preface to the addition of a selection of those decisions in *Butterworths' Workmen's Compensation Cases*, which are not to be found reported elsewhere. The Digest is a very useful one, and also very complete. The thoughtfulness of the editing is exemplified in the alphabetical indexing of the List of Cases digested with the names of both Plaintiffs and Defendants.

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*The Annual Statutes 1910* By W. H. AGGS, M.A., LL.M. London : Sweet & Maxwell. 1911.

*Butterworths' Twentieth Century Statutes 1910.* Under the general Editorship of H. H. KING, LL.B. London : Butterworth & Co. 1911.

The year 1910 was less fruitful of legislation than most years of late, owing to the lamented death of King Edward VII. Out of

38 Public General Statutes, 21 have been selected by the Editor of the *Annual Statutes* as "Statutes of Practical Utility." The Finance Act 1910, the Act for altering the Accession Declaration, and the Licensing (Consolidation) Act 1910, are those of chief interest. The Editor alludes in his Preface to the growing practice of conferring large powers on the administrative departments, exemplified, as he says, by the size of the Appendix, which contains numerous departmental Rules and Orders, ranging from a Destructive Insects and Pests Order to Cinematograph Regulations. The notes are, as usual, excellent, and this sixteenth annual continuation of *Chitty* will, we think, be as much in request as its predecessors.

*Butterworths' Twentieth Century Statutes 1910* are attractively bound and produced. The volume contains all the public Acts of 1910, except six whose operation is limited to Scotland or the Isle of Man. The notes appear to be admirable. The printing is excellent, and we may particularly commend the large type in which the Table of Contents is done.

**Second Edition.** *The Law of Torts*. By J. W. SALMOND, M.A. LL.B. London: Stevens & Haynes, 1910.

When reviewing the first edition of Mr. Salmond's book, in the November number of *The Law Magazine and Review*, 1907, we said "Mr. Salmond appears to be an academic lawyer rather than a practical one. Since then "much water has flowed under London Bridge," and not only has the learned writer had more practical experience, but he has also become the Solicitor General of New Zealand. Whether consciously or unconsciously, this maturer experience is reflected in the tone of the revision of the present edition. Among the novelties introduced, is the dealing with the law of co-owners both as against strangers and *inter se*. Fair comment, the wrongful withdrawal of support to land, and the delivery of a dangerous chattel to another, are all subjects which have been elaborated. We do not agree with many of the statements contained in paragraph 126A (f), but space will not allow us to criticise in detail. But this we must say, that the deductions drawn and statement of the arguments underlying the judgments of the Court of Appeal, in *Baker v. Snull* (1 R. [1908], 2 K. B. 352, 825), appear to us to demonstrate that the learned Author has not studied the case with sufficient care. Both the Divisional Court and the Court of Appeal seem clearly to have

been of opinion that the County Court judge should have left the decision of the facts in the case to the jury, and should not himself have non-suited the plaintiff. It was in discussing the grounds upon which the County Court judge non-suited that the learned judges differed. But, according to our view, these differences even are not accurately stated by Mr. Salmond. However that may be, "*Cujusvis est hominis errare*" is a very good motto for a reviewer to bear in mind, and no doubt all this will be altered by the Author in a subsequent edition. Speaking of the book generally, we can only repeat what we said of the first edition, namely, that this treatise reaches a very high standard of excellence, and we hope that some day the learned Author will find time to compile a companion volume on the law of Contract.

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**Second Edition.** *The law relating to the paving and sewerage of new streets and private streets.* By J. SCHOLEFIELD and G. R. HILL. London: Butterworth & Co. 1911.

The Authors in their Preface state that this work is the successor to a smaller treatise on the Private Street Works Act 1892. That Act was an attempt to deal with the deficiencies which experience had shown to exist in the legislation giving to local authorities powers to make up new streets at the expense of the owners of adjacent property. The present book points out that there are now three main "paving codes" in force in England and Wales, viz. (1) the Metropolis Management Acts 1855—1890; (2) Public Health Act 1875 amended by the Act of 1890; and (3) the Private Street Works Act 1892. The scheme of the book is to treat the three "codes" in separate chapters, setting out the effect of the principal sections of the different Acts and of the decided cases bearing on their interpretation. Where they have no decisions to guide them, the Authors are not afraid to indicate their own opinion. For instance, the question of how far the fact of some works having been carried out in private or new streets precludes the local authority from subsequently requiring the owners of adjoining property to execute further works, is discussed fully in the chapter dealing with the Public Health Act, pp. 59—64. The Private Street Works Act contains sect. 6, which empowers a local authority "from time to time" to resolve to do any more of the specified works, one of which is sewerage. Their comment on this, in the chapter on Private Street Works, p. 108, is that these words enable an authority to make up a street over and

over again at the frontagers' expense as often as the work is required, until the street is taken over as a highway repairable by the inhabitants at large, but that when a street is once sewered to the satisfaction of the authority they cannot lay a new sewer at the expense of the frontagers. The opinion thus expressed may be right, but it seems at variance with the express words of the section, and should not be accepted implicitly until confirmed by the decision of a superior Court. While one may be sceptical as to the correctness of some of the views put forward, one is struck by the evident care bestowed on the work. The cases cited are many. The Index seems to be full and accurate. Surveyors and others who have to carry out the executive work of sanitary authorities—as well as lawyers—should find this book useful.

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**Third Edition.** *The Law of Waters.* By H. J. W. COULSON and U. A. FORBES. London: Sweet & Maxwell. 1910.

The last edition of this work, published in 1902, was exhausted a year or so ago, and a new edition is therefore welcome. Several important statutes affecting the subject treated have been passed, and also some noteworthy decisions have been given. The most important statutes are probably the Merchant Shipping Acts and the Port of London Act 1908; and the new cases number something like 300. It is only necessary to glance at the full title of the work to see how wide a scope it covers, as it is stated to include "rights and duties of riparian owners, canals, fishery, navigation, ferries, bridges, and tolls and rates thereon." It is something of an achievement to be able to get a reasonably full account of the law on so many important and difficult subjects into a reasonable compass, and the Authors have accomplished it in a satisfactory way, and to have the information they have put into one volume would require quite a small library. It would be an improvement if the Authors in their next edition inserted the dates of all the cases, as it is often very convenient to be able to see at a glance when a case was decided.

**Fourth Edition.** *The Workmen's Compensation Act 1906.* By A. PARSONS and R. ALLEN, M.A. London: Butterworth & Co. 1910.

The Workmen's Compensation Acts are not unjustly described in the quotation from *The Tempest*, at the beginning of the Preface to the Third Edition of this work—"This is as strange a maze as e'er

man trod." The difficulties arise from a variety of causes, partly from the nature of the liability of the Employer being based on no principle of law, but merely on statute; from bad drafting, and from the marked inclination of the Courts to treat matters in dispute as questions of fact. This last, of course, does not facilitate the interpretation of Statutes, and though it "has been much less marked" with regard to the Act of 1906 than to the earlier Act, it still exists. The Authors examine all the debatable questions with the greatest care and acumen, as witness their comments on "sub-contracting." The words "Works undertaken by the principal," have been considered by the English, Irish and Scotch Courts. The English and Irish Courts differed, and the Scotch Judges were divided in opinion, but the most recent case in England, *Skates v. Jones*, seems to support the construction placed on the section by the Authors. The Authors have felt justified, as the result of minute examination of this Act, in criticising it severely. Of section 8, which deals with industrial diseases and "constitutes an entirely new departure in English legislation," they say "The Arrangement of the section is cumbrous, and in considering the effect of any particular words, it will be necessary to observe carefully the context in which they occur in the elaborate network of sub-sections, paragraphs, modifications and provisions, of which the section consists."

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**Fourth Edition.** *The Law of Trusts and Trustees.* By A. R. RUDALL and J. W. GREIG. London: Jordan & Sons. 1911.

The present edition of this treatise has been issued mainly in consequence of the Public Trustee Act 1906. This is incorporated in the present volume with notes and the Rules. There is an interesting Introduction to the Act written in an appreciative spirit. Although no cases have yet been decided on the Act, there are a certain number of cases cited in the notes. The rest of the work consists of the Trustee and cognate Acts from 1888 onwards fully annotated and commented on, with the Rules, and a collection of forms for use under the Trustee Act 1893 and the Judicial Trustees Act 1896. It is interesting to note that in their Introduction to the first edition in 1894, the learned Authors say, "The creation of a Public Trustee to take over the management of trusts would be a legislative achievement of lasting value." The book strikes us as one of real usefulness.

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**Fifth Edition.** *Maclachlan's Law of Merchant Shipping.* By E. L. DE HART and A. T. BUCKNILL. London: Sweet & Maxwell. 1911.

Messrs. Hart and Bucknill have had a heavy task in bringing Mr. Maclachlan's well-known work satisfactorily up to date. The last edition was issued so long ago as 1892. The then statute-law was contained in the Merchant Shipping Act 1854 and amending Acts. These Acts were all repealed by the Merchant Shipping Act 1894, which codified the law in nearly 750 sections. This Act has in its turn been amended and supplemented by no less than seven other Merchant Shipping Acts, of which the most important, the Act of 1906, has 86 sections. The Editors warn us that further changes in the law may be imminent, as a Departmental Committee appointed by the Board of Trade is now considering the question of pilotage. Another important piece of legislation which has to be considered is the Marine Insurance Act 1906. The reader will find some interesting notes—in the section treating on the Law of Nations as to Prize of War—on the effect which the Declaration of London, if ratified, will have on the existing rules on that subject. Apparently, a printer's error has made the reference to this in the Preface read curiously, as it is stated therein that the Naval Prize Bill introduced into Parliament this year, had its progress "arrested by the Dissolution at the end of November for the purpose of giving appellate jurisdiction," etc. Several causes have been suggested for the last Dissolution, but this is certainly not one of them. A large number of cases have been added, many of them due perhaps to the establishment of the Commercial Court. Among other alterations, the treatment of the law of damage has been re-written and expanded. The result is that the work is now well up to modern requirements, though if the Editors' forecasts are correct, it is doubtful if it will long remain so.

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**Sixth Edition.** *A Summary of the Law and Practice in the Ecclesiastical Courts.* By T. EUSTACE SMITH. London: Stevens & Haynes. 1911.

There is so little direct legislation in connection with Ecclesiastical law, and it is so built up by judicial decision, that in compiling a new edition it is often only necessary to bring the cases up to date and to do the same with notes. This Mr. Eustace Smith, so well known in the Ecclesiastical Courts, has



done most efficiently in his treatise, which is primarily intended for students. Within the scope of a handbook of this nature, it would be impossible to do more than to extract the kernel, leaving the reader to go to Burns' *Ecclesiastical Law* or to Sir Robert Phillimore's work for a fuller dissertation on the principles or history upon which these essentials rest. In his manner of selection and extraction the learned Author is to be most highly commended. In one short sentence or paragraph a graphic picture may be presented to the student's mind of innumerable suggestions upon a subject, which will tempt him to delve into the deeper authorities by exciting his curiosity. Of this art, Mr. Eustace Smith is a past master. If one might pick out a good example, it would be by calling the reader's attention to the disquisition on Doctrine and Ornaments. Here, in six pages, is given all the essentials of two very burning questions, but creating a desire to read thoroughly such standing authorities as *Clifton v. Ridsdale*, *Read v. Bishop of London*, or *Martin v. Mackonochie*. In the Appendix are to be found the Rules of the Court of Arches, together with tables of certain Ecclesiastical Fees. The Index is excellent and presents a good key to the text.

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**Sixth Edition.** *Fisher's Law of Mortgage.* By A. UNDERHILL, M.A., LL.D., and A. COLE. London: Butterworth & Co. 1910.

Mortgages are of great antiquity; to say nothing of Roman law, they are mentioned in *Domesday*, and Glanvill has a good deal to say about them. The earliest treatise devoted to the subject that we have been able to come across is one by Mr. Samuel Carter, who published his second edition in 1728. In his Preface he impresses on his readers the importance of a knowledge of that branch of law, "The Want of a true Understanding whereof hath often times proved fatal to Purchasers as well as Mortgagees; and that not only for the Loss of their Money but the vast Charges consequent upon tedious and vexatious Suits both in Equity and at Common-law." A remarkable contrast is presented between Mr. Carter's modest octavo of about 260 pages and the present royal octavo of 1,028 pages, with 180 more pages of Tables of Statutes, Cases, etc., and an Index of 160 more. The growth of the volume is not perhaps greater than that of the property affected by mortgages. It was calculated 20 years ago that mortgages in England were equal to 58 per cent. of the value of the real

property, and Sir F. Palmer estimated the amount of debentures outstanding in 1907 at five hundred million pounds. When Mr. Underhill took up the editorship of the last edition he completely re-arranged and sub-divided the text, added 900 new cases, and generally revised the whole, besides adding some new sections on Mortgage Debentures, Mortgages of Choses in Action, Mortgages by Tenants for Life and other Limited Owners, and re-wrote the section on the Bills of Sale Acts. Although seventeen years have passed since then, there is not a very great number of new Statutes which require noticing. A new section has been added on Mortgages under the Land Transfer Act 1897 and the Companies Consolidation Act 1908. A large number of new cases has been added and considered. Among them it is interesting to note the Irish Courts have, in the recent cases of *Bank of Ireland v. Cogry Spinning Co.* and *Re Bobbett's Estate*, questioned the doctrine laid down in *In re Richards, Humber & Richards* and *Isaac v. Worstencroft*. Fisher has long been the standard work on Mortgages, and promises to remain so.

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**Sixth Edition.** *Scrutton on Charterparties and Bills of Lading.* By Sir T. E. SCRUTTON and F. D. MACKINNON. London: Sweet & Maxwell. 1910.

It is not necessary for us to say words of commendation about this work. *Scrutton on Charterparties* has been established as an authority for nearly five-and-twenty years, and its Author has recently attained his well-earned promotion to the Bench. It will be noticed that Mr. Mackinnon has in the present issue been associated in the editorship. The form of the work continues the same—that is, a number of articles with illustrative cases at the end of each. There are both foot-notes and occasional notes dealing with the illustrative cases. About 140 new cases have been dealt with in this edition. The Author, in the Preface to the present edition, refers to the remarks contained in the Preface to the Fourth Edition respecting the Commercial Court, and maintains that they are still appropriate. Let us hope that Sir Thomas's influence with his fellow-judges may bring about the improvements in the practice of the Commercial Court that he advocates. The increasing size of the volume has induced the Editors to omit the forms printed in Appendix 2, but a list is given of the forms contained in that Appendix in the last edition. Appendix 2

is of great value, and contains the customs of the ports of London, Liverpool, Bristol, Glasgow and Hull, as they existed in 1910. Appendix 3 contains the principal Statutes affecting the Contract of Affreightment, and there are other Appendices containing valuable information.

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**Eighth Edition.** *Broom's Legal Maxims.* By J. G. PEASE and H. CHILLY. London: Sweet & Maxwell. 1911.

Dr. Broom's idea in writing this work was "not only to point out the most important Legal Maxims, but also to explain and illustrate their meaning," and his success was due to his judicious selection and classification of the illustrative cases. The success of his efforts has been shown by the wide circulation his book has attained and the steady issue of editions. The last edition appeared in 1900, and the present Editors have incorporated the suitable recent decisions and made some slight modifications. We think that the book continues to justify its Author's hope that it will not only be useful to students, but also to the practising barrister.

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**Eighth Edition.** *Principles of Contract.* By Sir FRIDRICK POLLOCK, D.C.L. London: Stevens & Sons. 1911.

Like books of approved literature, of which it was a habit of the last century to assert that no gentleman's library could be without, this learned work, full of ordered knowledge absorbed from Rome, from our own annals in Saxon times down to the present day, and from the newer developments of business enterprise in the United States, claims a prominent place on the bookshelves of every lawyer. A quarter of a century has passed since it first appeared, and in that long stretch of time it is almost a certainty that no case in the Courts, and no section of a statute affecting any principle of this branch of the law, has escaped the observation of the distinguished Author. Sir William Anson, in the early editions of his excellent book for students, acknowledged the suggestive value to him of Sir Frederick Pollock's researches and labours. But Sir Frederick is not chained to technical doctrines or to accepted divisions of his subject. Mutual promises, for instance, as a basis of contract he traces back for more than three hundred and fifty years, but compelled by the consideration of certain actions (noted in our issue of February, 1904, Vol. XXIX, No. 331) which ensued out of the postponement of the coronation of Edward VII,

he arraigns the doctrine as being founded not upon reason but merely on the fluctuating support of convenience. And there is an evident wish in his mind to break up the chapter on Impossible Agreements, and to assign to other divisions of the work the principles and illustrations which it contains. Without disparagement of other sterling and valuable treatises on the subject, it may be asserted that the treatment of this is eminently philosophical. It is none the less practical, and so close up to date has it been brought, that cases are included in it which were decided so recently as the 10th of November last.

**Sixteenth Edition.** *Pratt and Mackenzie's Law of Highways.* By W. W. MACKENZIE. London: Butterworth & Co. 1911.

The law of Highways is one of great and increasing importance. The growth of a large motor traffic has given rise to many new questions, and it is certain that many points of great importance, and some of much difficulty, will arise under the Development and Road Improvement Funds Act 1909. It is impossible to predict what the effect of that Act may be, but it may be very far-reaching. The inclusion of this important statute would alone justify the issue of the new edition. The Costs in Criminal Cases Act 1898, and the Criminal Appeal Act 1907, have introduced important changes in respect to Appeals from convictions on Highway and Bridge Indictments and the costs of bringing such indictments. We are inclined to agree with the learned Editor when he regrets "that when the law was being amended facilities were not introduced for an appeal from an acquittal as well as from a conviction." One feature of the present edition is the number of cases decided on the Motor Car Act 1903. Some important cases have also been decided on the question of extraordinary traffic, which is discussed at considerable length in the notes to sect. 23 of the Highways and Locomotives (Amendment) Act 1878. This is a question which has given rise to "much difficulty and much difference of opinion." The apparently simple words "average expense of repairing highways in the neighbourhood" have given rise to extraordinary difficulty in practice. After giving examples of the different sorts of calculations surveyors have entered into, Mr. Mackenzie pronounces them to be "idle, illusory or treacherous." Another interesting point under this head to which he calls attention is one on which there does not seem to have been any express

decision, namely, when does the liability for extraordinary traffic cease? It might be put as, when does extraordinary traffic by dint of repetition settle down into ordinary traffic? The work is divided into two Parts. The first deals with the law of Highways independent of Statute, and takes about 150 pages. The second half gives the Statutes relating to Highways, Main Roads, Streets and Bridges. The notes are numerous and full. The second Part contains about 900 pages. There is also an Appendix of a few more Statutes, Circulars, etc., and a good Index of no less than 150 pages. The only fault we have to find with this volume is its great weight, which we must admit is partly caused by the excellence of the paper on which it is printed.

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**Nineteenth Edition.** *Concise Precedents in Conveyancing.* By M. G. DAVIDSON, M.A., and S. WADSWORTH, M.A. London. Sweet & Maxwell. 1910.

The arrangement of this treatise is remarkably good. We have first of all observations on (a) The Real Property Act 1845; (b) The Conveyancing and Law of Property Act 1881; (c) Compulsory Registration of Title and Dealings with Registered Land and Charges under The Land Transfer Acts 1875 and 1897. These observations are most valuable and helpful including as they do, in the present edition, The Finance (1909-10) Act 1910, and the New Rules of 1907 and 1908 with regard to the Land Transfer Acts 1875 and 1897. Then we come to the main part of the text, composed of Precedents on every conceivable subject. The Precedents being made as lucid and simple as possible, may easily be used by the layman, in such cases as Wills, without fear of creating after confusion. The eighteen Appendices contain all the Statutes necessary for general use with the text of Precedents, and have very complete and copious foot notes of explanation. We think it an excellent idea to separate the Index to Introductory observations and notes from the Index to Precedents, making for ease and rapidity of reference. The whole book shows an anxiety on the part of the Authors to bring it thoroughly up to date, and to make the information contained in it as comprehensive as possible. In our opinion they have been quite successful in their endeavours, and have achieved their object with a large amount of credit to themselves.

**Twenty-first Edition.** *Paterson's Licensing Acts.* By W. W. MACKENZIE, M.A. London: Butterworth & Co. 1911.

*The Annual Licensing Practice 1911.* By R. M. MONTGOMERY, M.A., and H. D. WOODCOCK. London: Sweet & Maxwell. 1911.

**Fourth Edition.** *The Licensing Acts.* By J. C. WHITELEY, M.A., and S. H. LAMB. London: Stevens & Haynes. 1911.

In 1910, following the recommendation of the Royal Commission appointed in 1896 to enquire into the operation and administration of the laws relating to the sale of intoxicating liquors, the Licensing (Consolidation) Act 1910 (10 Edw. VII and 1 Geo. V, c. 24) was made law, and after January 1st, 1911, it was to take the place of thirteen previous Licensing Acts in this respect. Furthermore, two new Finance Acts were passed in the same year, the much-debated Part II of the Finance Act (1909—1910) Act 1910, making a heavy increase in the duties payable and substituting a new set of excise liquor licences in place of those then existing. The second Finance Act slightly altered the law which dealt with beer and cider retailers' licences. The Consolidation Act, containing 113 sections, serves the double purpose of codification and explanation of formerly confused points. As was to be expected, it was not long before the new Finance Act came before the Courts for interpretation. In *Wrigglesworth v. The King*, decided on December 16th, 1910 (reported in *The Weekly Notes*, January 7th, 1911, p. 7), Channell, J., had to construe the effect of sect. 44 (1) as to the way in which the value of premises for the purpose of the publican's licence duty ought to be ascertained.

In bringing out the 21st edition of *Paterson's Licensing Acts*, Mr. Mackenzie, who has edited the eleven last editions, shows his skill in mastering and elucidating the mysteries of this branch of law. The present edition indicates that the learned Editor is quite alive to the revolution caused by the new Consolidating Act, and meets the situation with his usual erudition and thoroughness. It is perhaps needless to criticise in any detail a work so well known in the legal world as *Paterson*, and it is sufficient to say that the present edition is quite up to the usual high standard of efficiency existing in former editions.

*The Annual Licensing Practice 1911* possesses one quite novel feature, for under the side note to each section of the codifying Act is printed the particular section in other Acts which it replaces. This makes for easy reference if the reader wants to see the exact

wording of the repealed section. Apart from the Consolidation Act, the other licensing matters are placed in a manner which allows for logical order and coherence of treatment. We are not quite certain but what the scheme of giving in the foot-notes only one reference for each case cited, giving a full list of references in the Table of Cases, is likely to cause considerable irritation and delay.

Mr. Whiteley carries on the useful work initiated by his father, and with the experience he obtained whilst preparing the third edition, has succeeded in giving to the reader a work of considerable merit and utility. One special feature in this book is the Introduction to Part I, which presents an excellent historical survey of licensing legislation from the passing of the Alehouse Act in 1828 right up to the present time. The codifying Act is set out, and its sections carefully annotated. Part II deals with Excise Licences and all matters relevant thereto. Billiard Licences, Music, Dancing and Theatre Licences, Refreshment House Licences, &c., find a place in Part III. In the Appendix we find Rules and Regulations of the London and Surrey Quarter Sessions and London County Council, made under various Acts, together with some excellent original Forms of Notices. In reviewing these three works one is struck by the amount of Legislation there is in existence affecting Licensing, how much has been done to simplify that branch of law, and how much there yet remains to be done in order to co-ordinate and systematise the whole subject.

**Forty-third Edition.** *Stone's Justices' Manual.* Edited by J. R. ROBERTS. London: Butterworth & Co. 1911.

**Eighth Edition.** *The Magistrates' General Practice.* By C. M. ATKINSON. London: Stevens & Sons. 1911.

*The Justice of the Peace and his Functions.* By a MIDDLESEX MAGISTRATE. London: J. M. Dent & Sons. 1911.

The magistracy are much ridiculed and often abused, but have fresh duties constantly thrust upon them, which surely seems a sufficient proof that on the whole their duties are well discharged. Every magistrate who wishes to be efficient must from time to time acquire some book on magistrates' law, and study the recent statutes and decisions. He is in the fortunate position of having only the difficulty of choice, as he will do well with either of the two works first mentioned above, and whether he chooses by size, arrangement or

colour, he will get a most satisfactory guide. Both are edited by very experienced lawyers, and both contain all, and more than all, that most magistrates are likely to want. Stone's is the larger and fuller work, but it is also the heavier. It contains 1,470 pages of text and index and over 170 pages of tables of cases, statutes, etc. If we wanted to find a fault we might perhaps hint that there is almost too much in it, and that a few subjects might be omitted without much loss. An instance that has occurred to us is the account of the trial of a clergyman in a Consistory Court, which does not seem to have anything to do with magistrates beyond the reference to proving a conviction by a temporal Court, and which might have been put shortly, as it is by Mr. Atkinson, in four lines. Although there has not been a great deal of legislation to be included, there are two very important statutes. The first is the Licensing (Consolidation) Act 1910, which has involved re-casting and re-writing an important section of these works. We are glad to note that Mr. Roberts considers that "the Act as a whole has been admirably drawn." He points out some difficulties that have already arisen, and gives his opinion on them. The other important statute is the Finance Act. It is worth noticing that the Children Act (1908) has already had to be amended as a consequence of the decision in *R. v. Moon*. There is an unusually large number of cases dealing with the subject matter of these books. For instance, *R. v. Norton* shakes the authority of *R. v. Thompson* as to statements made in the presence of accused persons. In *May v. Bealey* it was apparently held that the defendant has power to waive the provisions of section 13 of the Summary Jurisdiction Act 1848. The Wild Birds Protection Act would seem to prohibit the recent crusade against wood-pigeons, unless the Secretary of State has made some order on the subject, though perhaps it might be successfully contended that the whole army of guns were authorised by the several occupiers of the lands over which they shot.

The little book, *The Justice of the Peace and his functions*, is a very readable work, giving an outline of the duties and powers of magistrates on and off the bench, and giving advice marked by much shrewdness and common-sense as well as knowledge of the subject.

*The Frankpledge System.* By W. A. MORRIS, Ph.D. London: Longmans, Green & Co. 1910.—This is a work of much research into a device, whether Saxon or Norman in origin, by which the



rural peace in Plantagenet days was safeguarded through the surety compulsorily undertaken by a number of neighbours for the good conduct of each. The Author, rejecting William of Malmesbury, who affirms frankpledge to have been a custom in Alfred's days, can trace no mention of it which he deems authentic till the twelfth century; but survivals of it he recognises as late as the nineteenth. No doubt it made for exclusiveness, but amongst its advantages it checked unwelcome immigration, for no man could remain more than a year in any place unless he was sworn in Court and had his name entered upon the Court rolls. In the Appendix a copy is given of a tithing list of Harston, a place known to every Cambridge man, in the reign of Richard II. The book is of great interest and of profound learning; and it adds to its interest that it is produced under the authority of Harvard University.

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*The Law relating to Trade Unions.* By J. H. GREENWOOD. London: Stevens & Sons. 1911.—The Author describes his object as being to make the law on this subject intelligible to Union Officials and others who have not ready access to the Law Reports. The book opens with a chapter on the Functions and Status of the Trade Union, interesting both from the historical and legal points of view. Then follow chapters on Restraint of Trade, Liability of Trade Unions in Tort, Strikes, and Trade Union Funds. The book is clearly written and the cases are very fully described, the facts of each being given in some detail. *A. S. R. S. v. Osborne* is treated at length in an Appendix, and an *Addendum* contains *Osborne v. A. S. R. S.* There is a good Index, and the book is one that can be recommended.

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*The Solicitor's Clerk.* Parts I and II. By CHARLES JONES. London: Effingham Wilson. 1910-11.—This is the seventh edition of Part I and the fifth edition of Part II of this useful little guide, designed, as the Author says, *inter alia*, in his Preface, to give the solicitor's clerk practical hints rather than a learned dissertation on the law. The book deals thoroughly with the routine of a solicitor's office. The first chapter of the first Part contains advice as to qualifications, the best way to obtain a situation, and the best situation to obtain. Thereafter such various matters as the drafting of documents, shorthand-writing, conveyancing, and the course of an action are discussed. This

last is well and faithfully described under the pseudonym of *Broken v. Fourx*, special attention being paid to matters particularly affecting solicitors' clerks, such as the need of looking after witnesses, in which connection the Author is enabled to give an amusing personal experience. In the second Part the Author treats of Magisterial Law and Practice, Criminal Trials, Licensing, Bankruptcy, and Trusts. There is a capital Glossary of Legal Maxims and Technical Expressions. Both volumes are well furnished with Tables of Costs, &c., and altogether are well worth the modest price stamped on them.

*Butterworths' Workmen's Compensation Cases.* Vol. III. New Series. Edited by His Honour Judge RUEGG, K.C., and DOUGLAS KNOCKER. London: Butterworth & Co. 1910. — Every case under the Act of 1906 decided by the House of Lords or the Court of Appeal in the year ended October 1910, is reported at length in this volume, and the judgments fully given. And it is claimed that 76 of the included cases are unreported elsewhere. This completeness makes the volume of special value to Insurance Companies who have in the course of time many thousands of pounds at stake, as it is possible that a decision in a new case may turn upon a case which is reported only in this work.

*Four Thirteenth Century Law Tracts.* By G. E. WOODBINE. Yale University Press. 1910. — This is a thesis for the degree of Doctor of Philosophy at Yale. The tracts are *Pet Asaver*, *Judicium Essoniorum*, *Modus Componendi Brevia*, and *Exceptiones ad Cassandum Brevia*. The Introduction and notes are textual and bibliographical rather than legal, and the book suffers from want of an Index. The writer attributes the first two tracts to Hengham, chiefly from similarity of style, especially in the occurrence in them of the modest phrase in Hengham's acknowledged works, *de quibus ad praesens non recolo*.

*A Digest of the Law of Trust Accounts.* By WALTER STRACHAN. London: Effingham Wilson. 1911. — This volume is concerned with all matters of Receipts and Outgoings between the lifeowner and the remainderman. The chapter which deals with the distinction between Capital and Income, often in practical instances difficult to decide, is founded upon the theories of Professor Irving Forster. It covers but eighteen pages, but its preparation and arrangement

must have demanded a good deal of labour, and it can be commended for its clearness. The Author not only treats of the complicated adjustments which have to be made between the chief parties, but between beneficiaries other than those. A very large number of cases, brought down to October last, and last editions of text books issued up to the same date, are referred to.

*Outlines of Constitutional and Administrative Law* By DAVID L. CHAMBERS. London: Stevens & Haynes, 1910.—This is a very useful little work dealing with the hundred and one pieces of knowledge required by the up-to-date citizen. In it is given an outline of such important matters as the Legal Status of the Subject, the Royal Prerogative, Parliament and all subjects appertaining thereto, and Municipal Boroughs. The Author marshals his facts in a brief but illuminating manner, and the book may well find a place in the library of either lawyer or layman. The Index is an excellent key to the text.

*Every Man's Own Lawyer*. London: Crosby Lockwood & Son, 1911. This handy book of the principles of law and equity continues to be revised with the care which commends it to its special circle of purchasers. The Editor has had to rewrite the portions dealing with Duties, Taxes and Excise Licences, and also on Licensing law. The Editor has adopted a rather unusual course in referring in his Introduction to legislation which is not touched on in the body of the work. The case of *R v Moon*, and the Amending Act passed in consequence, seems to have escaped his notice.

**Second Edition.** *Digest of the Law of Discovery*. By His Honour Judge BRAY. London: Sweet & Maxwell, 1910.—It is safe to say that there is nobody who has a wider and more intimate knowledge of the law of Discovery and Inspection than the learned Author of this Digest, for in addition to his standard work on the subject, he has for many years contributed to the *Annual Practice* the notes on what is now Order XXXI. These notes were some time ago collected and published in a separate volume, of which this is the second edition, and to the portion of the work which deals with the practice under the several rules of the Order is added a concise but sufficient summary of the principles of the doctrine. Although the bulk of the book is a reprint of what appears in the *Annual Practice*, the issue in this convenient and portable form will no doubt be found valuable for easy and rapid reference.

**Eighth Edition.** *Innes' Digest of the Law of Easements.* By N. L. GODDARD. London: Stevens & Sons. 1911.—This is a short and apparently a useful treatise on the subject. A large number of alterations from the former edition have been made in the present one. The cases quoted include those to the end of 1910, and the Index has been entirely re-cast.

**Eleventh Edition.** *The Workmen's Compensation Act 1906.* By W. ADDINGTON WILLIS. London: Butterworth & Co. 1910.—This book has evidently been received with favour in the past, for the editions have followed one another rapidly and almost regularly; and the clearness of the notes seem to warrant the public partiality. In a subject on which new points arise with the frequency which distinguishes this new legislation, it is of great importance to persons interested, lay or professional, to possess a handy volume of reference which they can feel sure is up to date. The Author claims that all appealed cases reported as recently as the 1st of November, 1910, have been included; and that considerably over three hundred new cases have been referred to in this edition.

**Twelfth Edition.** *The Law of Stamp Duties on Deeds and other Instruments.* By E. N. ALPE; Revised by A. B. CANE. London: Jordan & Sons. 1911.—Though this treatise is limited to Stamp Duties, the subject is one to which constant reference has to be made by the Solicitor, and it is frequently essential to members of the Bar. There are about twenty Acts connected with the subject, which are dealt with in this volume; and the information and guidance afforded by the text will be found valuable by the practitioner. The chief decisions arrived at since the last edition are inserted in the appropriate places.

**Eighteenth Edition.** *Rouse's Practical Man.* Revised by E. A. SWAN. London: Sweet & Maxwell. 1910.—This little work is divided into two Parts. In the first Part we find all those facts, legal and *quasi* legal, which the "man in the street" wants collected for reference, and in the second Part is collected tables and rules necessary to be applied to that knowledge. Part I is arranged in alphabetical order, and comprises such useful subjects as Bills of Sale, Death Duties, Distribution of Personal Estate of Intestate, Married Women and Wills. Part II gives us (A) Logarithms; (B) Rules for Measurements and Calculations generally useful; (C) Tables and Calculations useful for Trades;

## REVIEWS.

of using Tables; (F) Tables. At the commencement is inserted an excellent Table of Descents. In the Index, the references are given in two parallel columns to Part I and Part II, this shows whether the reference is to facts or to figures. It would be absurd to maintain that the facts or information given is encyclopædic, but such as it is, it undoubtedly is useful to the layman who does not want to go to the expense of consulting his lawyer on some point of necessary but minor importance. Judged from that standpoint, this book is one of sterling quality and practical utility.

CONTEMPORARY FOREIGN LITERATURE.

*L'Idée d'une Science du Droit Universel Comparé*. By G. DEL VECCHIO. Paris, 1910.—The Author traces its beginnings in Bacon and Vico, and complains of the neglect of Feuerbach by modern writers on the subject. His work, *Idee und Notwendigkeit einer Universaljurisprudenz*, was published by his son in 1853, twenty years after his death.

*Die Kriminelle Fruchtabtreibung* By Dr. VON LISZT. Zurich, 1910.—A history of the laws against abortion, from Hammurabi, Numa, and the Grægas, downwards. This is only the first volume on this unsavoury subject, and it occupies 274 pages. English authorities begin with Fleta.

*Polish Restraint for Women* By Professor C. A. REUTERSKJÖLD. Uppsala, 1911. This work is a commentary on a royal decree of 1909 ordering a collection of statistics as to the political rights of women. A large part of the book is occupied by a report of the hearing before the United States Committee on Woman Suffrage at Washington in 1900. Four States—Wyoming, Colorado, Idaho, Utah—grant complete equality with men, other States grant only modified rights, and others none. There is a useful map showing these differences in detail.

## PERIODICALS.

*Annuaire de la Législation du Travail, Année 1909* Brussels, 1910 -A ponderous volume of nearly 1,000 pages. New Zealand appears to have passed the most numerous statutes on the subject.

Massachusetts has codified the law relating to labour in 147 sections (1909, c. 514), and New York in 241 sections (1909, c. 36).

*Journal du Droit International Privé.* I—IV. Paris, 1911.—These numbers contain a large amount of most valuable information. Dr. Depuichault writes on the inconvenience for foreign creditors of English Company law (p. 54). "L. D." compares the criminal procedure of England and France as illustrated by *le procès Crippen*, calling it a drama of the "Herlock Sholmes" order (p. 168). Among the decisions are the following:—Where a decisory oath has been taken in Germany and an action as for a *chose jugée* is brought upon it in France, the French Court will issue a *commission rogatoire* to inquire into its legal effect (p. 190). The case of Savarkar and his attempted escape at Marseilles is treated at p. 626, as it is also by several of the German periodicals. The captain of a foreign ship is liable to the Belgian penalties against contraband, although the smuggling was done by the crew without his knowledge (p. 642). There are several cases as to imitation of trade mark (*concurrency deloyale*), which seems to be quite as common on the Continent as in this country.

*Zeitschrift für Völkerrecht und Bundesstaatsrecht.* Breslau, 1910.—Professor Gregory writes a valuable article on the contributions of American judges to International law (p. 52). Though it has little to do with law, an article on the life and work of the humanist Laonikos Chalkokondyles (about 1426—1464) is interesting as literature (p. 72). The same may be said of Professor Kohler's sketch of the trade treaties of the Dutch East India Company, where some documents are given at length which it would be difficult to find collected in any other place (p. 140). Professor Kenny writes on the law of the air (p. 472), and Professor Güterbock on the Peerage Bill of 1719 (p. 553).

*Zeitschrift für Internationales Recht.* Vol. XX, 5 and 6. Leipzig, 1910.—There is not much of interest to English readers, except a discussion of the *concordat préventif* of Egyptian law and its recognition by the Landgericht of Karlsruhe.

*Blätter für vergleichende Rechtswissenschaft und Volkswirtschaftslehre.* Nos. 8 and 9. Berlin, 1911.—Articles on the legal position of Bosnia and Herzegovina (p. 232), and on liberty of conscience in Greece (p. 278), may be noticed.

*Deutsche Juristen-Zeitung.* 1 Jan.—15 March. Berlin, 1911.—Bismarck as a jurist is the subject of two separate notices (pp. 22 and 426). An account is given of the celebration of the centenary of the restitution of the order of advocates in France, held in Paris on Dec. 14th, 1910 (p. 139). The last number of the *Zeitung* is a *Festnummer* in honour of the ninetieth birthday of the Regent Leopold of Bavaria. Round his portrait are grouped the titles of the more important laws passed during his quarter of a century of office.

*Giustizia Penale.* 5 Jan.—9 March. Rome, 1911.—An employers' liability assurance society is not entitled to appear as *parte civile* in proceedings against a workman (p. 82). It is no offence to chant hymns in an open space two hundred metres from any house. It is an offence to publicly insult persons who are venerating relics (p. 154). A postal order is a public and not a private document; therefore forgery of the name of the recipient subjects the forger to the higher punishment for falsification of an *atto pubblico* (p. 258). A court may declare a father incapable of exercising *patria potestà*. This though the family make no complaint and his incapability only appears in the course of proceedings against a third person for an assault on his daughter (p. 291). At p. 253 is a short article on codification in England and a review of the last edition of *Archbold*, which has been *sottoposto ad una scrupolosa revisione*.

JAMES WILLIAMS.

Books received, reviews of which have been held over owing to want of space:—Hartley's *Analysis of Insurance*; Knowles' *Law relating to Electricity*; Curlewis, Edwards and Wrottesley's *Law of Prohibition*; Meares' *Law of Electricity in India*; *Hardcastle's Statute Law*; Fry's *Specific Performance*; Norman's *Death Duties*; Lewin on *Trusts*; *The Law of England, Vol. XV*; Spaight's *War Rights on Land*; *The Oak Book of Southampton*; Williams and Yates' *Law of Ejectment*; de Becker's *Civil Code of Japan, Vol. 4*; Topham's *Real Property*; Paterson's *Practical Statutes*; Byles on *Bills*; Challis' *Real Property*; Combe's *Law of Light*; *The Selden Society's Publications, Vol. 25*; Blake Odgers' *The Common Law of England*; Leader's *The German Law of Bills of Exchange*.

Other Publications received:—*Report of Register of Copyright, 1909-10* (Government Printing Office, Washington, U.S.A.); Blake's *Highway Law as affecting Property Owners* (The Surveyors' Institution); *Finland and Russia* (Harrison & Sons); Hamelin's *L'Affaire Savarkar*; *Butterworths' Workmen's Compensation Cases*—Quarterly advance sheets; *American Bar Association Reports, Vol. 35*; Betts' *The Sorrows of a Sheriff in the 15th Century*; Pappafava *Le Notariat en Egypte*; Tilsch's *Code Civil Général Autrichien*.

# THE LAW MAGAZINE AND REVIEW.

No. CCCLXI.—AUGUST, 1911.

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## I.—ENGLISH FRANCHISE LAW.

THE law of the franchise may be broadly divided under two heads—the ownership vote, and the occupation vote. This is what the logicians would call the *fundamentum divisionis* of the whole of the franchise law. And this basis of division should be carefully borne in mind throughout the whole of the subject; and if only this fundamental distinction between the ownership and the occupation vote were borne in mind, many mistakes in common practice might be avoided. For although the various franchise qualifications are not two but many, it will be found on examination that they each and all fall under one or other of the two heads, ownership and occupation—with the exception of a very few extraordinary qualifications which we shall deal with later. For although the Warden<sup>1</sup> of All Souls' College, who is one of the highest authorities on the subject, sums up the various qualifications under three heads,<sup>2</sup> viz.: property, occupation, and residence—yet the Warden has also said that the latter (residence) may be treated as a sub-division of occupation; and that the occupation voters may be subdivided into three, viz.: the occupier, the inhabitant occupier, and the lodger.

<sup>1</sup> Sir William Anson, Senior Member for Oxford University.

<sup>2</sup> *Law and Custom of the Constitution* (4th edit.), Vol. I, p. 117.



Although the lodger vote and most of the occupation votes are of recent origin—indeed apart from residence, all the occupation votes are of recent origin—yet the distinction between ownership and occupation dates at least as far back as the year 1430; it is clearly traceable in the whole history of the County franchise; but only in the nineteenth century it gradually emerges from the confusion into which the franchise law of the Boroughs had been gradually worked during a process of centuries by the political exigencies of unconstitutional kings and their corrupt ministers.

The distinction between the County and the Borough franchise is of great use in understanding—if indeed it is not actually identical with—the distinction between the ownership and the occupation vote. From 1430 to 1832 ownership was always necessary for the County franchise, but occupation not always.

On the other hand it is rather difficult to dogmatise as to whether ownership or occupation entered the more into the necessary qualification for the Borough franchise: there was very little fixed rule, and it depended so much on local custom: but it may certainly be laid down that, unlike the County franchise, the Borough franchise depended at least as much upon residence as upon anything else: and indeed the Warden of All Souls says, that “amid the obscurity which rests on the early history of the Borough franchise, it seems clear that whether the right to vote depended on the holding of land or on the contribution to local burdens, residence was in either case required, or perhaps it might be more true to say that non-residence was not contemplated.”<sup>1</sup>

Thus we may start from the proposition that the basis of the County franchise is ownership, and that occupation is the basis of the Borough franchise.

Previous to 1430 the method of conducting the Parlia-

<sup>1</sup> *Law and Custom of the Constitution*, Vol. I, p. 104.

mentary elections was somewhat loose and indeterminate. In some ways, however, it would almost seem to suggest a sort of manhood if not womanhood suffrage to satisfy the most up-to-date of modern politicians.

The right to vote, in County elections at least, was previously vested in those persons who were entitled to attend the meetings of the County Court. This County Court must not be confused with the modern institution of the same name established by the Act of 1846. The old County Courts would correspond more to the modern Assizes and Quarter Sessions; and some of their duties have since been transferred to the County Councils. The old County Court was the tribunal at which most of the legal business of the County and of people living in the County was transacted. Anybody entitled to attend this Court as a suitor in some civil or criminal case was entitled to take part in the election of knights of the shire: and presumably it was not necessary to start a law-suit in order to obtain this privilege. At first it may have been confined to the king's tenants or the tenants of some great lord; but as the general business of this County Court diminished in importance, the elections were apt to "fall into the hands of the sheriff himself or a few interested persons or a casual crowd." In other words, the County elections were in danger of becoming what the Borough elections actually became. It was therefore necessary, while Parliament itself was in its infancy, to determine the method by which Members of Parliament should be elected.

There was indeed an Act of 1406 by which "those who did choose" the members were required to put their seals to indentures containing the names of the newly-elected members, appended to the writ and returned to Chancery, of which practice there is still a survival at the present day, and of which we may have more to say later on.

However, this Act did nothing to determine as to who

should have the right of electing members. Hence the necessity for the Act of 1430, which with some extensions and modifications exists down to the present day. This Act, 8 Hen. VI, c. 7, determined the County franchise by restricting it to the owners of freehold land worth 40s. per annum; and the sheriff was empowered to examine voters upon oath as to their qualification. This Act has sometimes been called an aristocratic revolution, merely because it imposed some sort of qualification, and provided for orderly elections instead of throwing them open to a casual crowd. "Whereas the elections of knights have of late, in many counties of England, been made by outrages and excessive numbers of people, many of them of small substance and value, yet pretending to a right equal to the best knights and esquires; whereby manslaughter, riots, batteries, and divisions among the gentlemen and other people of the same counties shall very likely rise and be, unless due remedy be provided in this behalf——."

There was nothing either in the purport or in the general effect of the Act to bear out the description of an aristocratic revolution. It would seem, however, that for the first two years there was some doubt as to the probable effect, and hence as to the purport of the Act. And, therefore, in order to set the doubt at rest, there was passed the Act of 1432, which required that the freehold should be situate, and the voter resident, in the County for which the vote was claimed. If anybody owning a 40s. freehold could go wherever he liked in order to record votes, irrespective of local claims, there might be some cause for the description of an aristocratic revolution.

The two provisions of the Act of 1432 were probably merely declaratory of the purport of the Act of 1430. The first proviso, namely, that the freehold should be situate in the county for which the vote was claimed, was obviously declaratory, and has been in force ever since. The second

proviso, namely, that the voter should be resident in the County for which the vote was claimed, fell into disuse, and had become obsolete a long time before it was definitely abolished by the Act of 1774. Thus from 1430 to 1774 the County vote was essentially an ownership vote; although as it seems, an unsuccessful attempt was made to require residence also.

The Reform Act of 1832 (2 & 3 Will. IV, c. 45), which was a great enfranchising measure, carefully preserved the 40s. freehold vote. In one single instance indeed it might seem to restrict the 40s. franchise: but in four important ways it extended the ownership vote. Under that Act, the 40s. freehold, in respect of which a vote was claimed, must be either (*a*) in the occupation of the voter, or (*β*) an estate of inheritance (*viz.*, fee-simple or fee-tail), or (*γ*) acquired by marriage, marriage settlement, devise, or promotion to benefice or office. On the other hand, the Act expressly extended the franchise to (*a*) any sort of freehold worth £10 per annum, (*β*) copyhold of the same value, (*γ*) leasehold of the same value originally created for the term of (at least) 60 years, and (*δ*) leasehold worth £50 per annum originally created for the term of (at least) 20 years.

It will thus be seen that, except as regards copyholds and leaseholds, the Act of 1832, so far as concerned the franchise qualifications, scarcely differed from a merely declaratory measure. In one single instance, and that only in a very few and rare cases, it might be considered to operate as a restricting measure, namely, in the case of a life-estate merely, to which the owner had no other claim, of 40s. but less than £10 annual value (sect. 18). It may be possible to consider this very exceptional case a sort of connecting bridge between the ownership and the occupation franchise, but such a view is scarcely tenable; for indeed this particular franchise is obviously based on the old 40s. freehold vote; but tenancy for life is the lowest

form of freehold, and so some additional qualification was required to strengthen an otherwise weak claim: moreover the exceptional case was further narrowed by the Act of 1867, which reduced the £10 qualification to £5. But the Act of 1832 is important as a great enfranchising measure, because it extended the old 40s. freehold franchise to copyholds and leaseholds worth £10 per annum (sects. 19 and 20). There is only one more alteration to record in the ownership franchise.

The Representation of the People Act 1867 (30 & 31 Vict., c. 102) is the last word of legislation as to the qualification for the ownership franchise: it may therefore be as well to sum up promptly the present position. The Act reduced in all cases the necessary qualification of £10 to £5. Therefore *any sort* of freehold estate worth £5 per annum (whether fee-simple, fee-tail, or for life, and whether in occupation or not) is sufficient to confer a freehold vote (sect. 5); and likewise a leasehold estate originally created for at least 60 years worth £5 per annum: also, as under the previous Act, a 20 years' lease worth £50 per annum.

These copyhold and leasehold interests must be of so much clear yearly value, after deducting the lord's fees or ground-rent as the case may be. Such is the ownership franchise at the present day. There are, however, a few exceptions created by the Acts of 1832, 1867, and 1884, involved in the creation of Boroughs and the extension of the Borough franchise, to which we shall refer presently.

There was also a slight innovation made by the Act of 1884, in the prohibition of what were called "fagot votes." This Act (48 Vict., c. 3, s. 4) provided that no man should vote in respect of a rent-charge<sup>1</sup> unless he were owner of the whole rent-charge; and that co-tenants should not be allowed to vote as such, unless they were co-tenants by inheritance.

<sup>1</sup> On October 7<sup>th</sup>, 1910, a case was stated by the Revising Barrister at Hornsey as to whether a ground-rent should be regarded as a rent-charge.

At the time when the 40s. freehold qualification was established in the Counties, the conditions under which the Borough franchise was exercised, were so various and erratic that it is difficult to include the latter under the head of Franchise law, or indeed, any sort of law at all. There was certainly no hard and fast rule; and there was an utter absence of uniformity. For the most part, the Boroughs (or those who succeeded in managing them) were allowed to choose their own methods of electing representatives. The only statutory requirement was by the Act of 1444 (23 Hen. VI, c. 15), which required that the representatives of the Boroughs should be persons actually elected to represent them. This Act made the same provision with regard to Boroughs as the Act of 1406 had done as regards Counties, when the law of the franchise was still indeterminate. The Act of 1444 likewise required the mayor or bailiff to return the writ to chancery with indentures appended thereto, in which the names of the persons chosen were to be written, "under the seals of them that did choose them." But this did little more than ensure that the persons chosen should not be the mere arbitrary choice of the mayor or bailiff. In the case of Counties the return was made by the sheriff, but in the case of Boroughs the return was made by the mayor or bailiff in return to the sheriff's precept.

The most ancient of the qualifications for the Borough franchise is considered to have been tenure: that is, because the holding of land within a Borough was considered the most satisfactory evidence of membership of that Borough. Whether the holding of land within a Borough was in itself a qualification or was merely evidence of membership is another matter. Another qualification was that of residence and payment of "scot and lot," which meant certain charges for local or national purposes, or what we should call rates and taxes. It was the nearest approach to the usual modern

lication for the Borough vote. It would seem, however, that in the case of a great many Boroughs this sort of franchise was not available.

The next species of Borough franchise was by *incorporation*, which was and is probably the most satisfactory sort of franchise from the point of view of the voter. It is what we call being a freeman of a corporate town or borough. It originated in the admission of new members of the societies or corporations called Gilds. These Gilds were corporations created by Royal charter, and which enjoyed certain trading privileges in certain towns. The members of these Gilds had power to elect new members, which was called conferring on someone the freedom of the town. This might be done either in the way of business or as conferring a merely honorary title. In either case this freedom conferred a vote. The satisfactory part of it was that it did not necessarily imply either landowning or residence or any burdens or liabilities. There might or might not be other voters in the town besides the freemen. There is still a survival of it in one of the extraordinary franchises to which we shall refer presently.

A later form of Borough franchise was that arising from *corporate office*. This was a particularised form of the franchise by incorporation. This franchise arising from corporate office existed in towns which, under the Tudors, either received a Royal charter or were specially summoned to elect representatives to Parliament. In some cases the right was conferred by resolution of the House of Commons shortly after the Restoration; but then it was in order to give effect to some real or supposed charter of the Tudor period. Thus in some towns—for instance, Bath—the Borough electorate was made to consist of those who held corporate office, sometimes even against the will of the inhabitants.

In four towns the franchise qualification was the same

as in Counties, viz. the 40s. freehold, and in these Parliamentary Counties, Exeter, Bristol Nottingham, and Norwich, the same rules applicable to Counties have been expressly retained by the Act of 1832 (2 & 3 Will. IV, c. 45, s. 31). In some other Boroughs the franchise was some sort of variation of the County ownership vote: but these Boroughs have been abolished as such or given the ordinary Borough franchise by recent Acts.

In most Boroughs the necessary qualification for the franchise was either being a householder and paying "scot and lot," or residence, or both.

In some cases the choice of a Parliamentary representative was made by a committee consisting generally of municipal officers.

In some cases the right to elect representatives was conferred on the merchant Gild of a town by Royal charter, and in some cases it was assumed by the Corporation: in either case the claim was liable to be reviewed by Committees of the House of Commons.

Many Parliamentary Boroughs were created by the Tudor monarchs in order to support the influence of the Crown in the House of Commons. And considering the restricted and unrepresentative nature of the Borough franchise in such cases, it was an easy thing for the Crown to constitute Parliamentary Boroughs for its own ends. •

The first attempt at unification of the franchise was the Reform Act of 1832. It abolished what were called the rotten Boroughs, that is Boroughs which, having practically no electorate, were in the hands of a few interested persons. It also reduced the representation of many more. It also abolished all the peculiar forms of Borough franchise, *except* that the ownership vote in the four County Boroughs above mentioned was and is still retained, and the Act also retains the qualification by being a freeman of a chartered town. In most of these chartered Boroughs, however, the



Act has imposed the qualification of apprenticeship for becoming a freeman, and required residence within seven miles of the Borough for the freeman to vote as such.

But the great constructive work of the Act of 1832 (2 & 3 Will. IV, c. 45) was the creation of new qualifications. The same Act which extended the 40s. freehold vote to £10 copyholders and leaseholders in Counties, also created a £50 occupation franchise in Counties, the £50 being the annual rent paid by the occupier (sect. 20, which contains the Chandos Clause): the Act also created a £10 occupation franchise in Boroughs (sect. 27). And this new occupation vote was an uniform franchise both in the new Boroughs and in the old Boroughs which continued to exist. The essential requirement was occupation rather than residence; as the occupation might be of any house, warehouse, office, or shop, or other building of the clear yearly value of £10; and the occupier was only required to reside six months in the year within seven miles of his Borough (sect. 33). It was also required that the £10 occupier must have been rated and must have paid his rates up to date in respect of his tenement. Thus, in the Act of 1832, the law of the Borough franchise made a great advance at a single stride; though the seven miles rule is suggestive of some of the earlier Borough franchises, and the requirement of rating is clearly a continuation of the rule about "scot and lot."

It is also provided by the same Act (2 & 3 Will. IV, c. 45, sect. 24) that no person may vote in a County election in respect of a freehold building, occupied by himself, which would confer a vote for a Borough in which it is situated: but he may vote in a County election in respect of property situated in a Borough, if he be disqualified for a Borough vote by reason of his not occupying it.

This section of the Act of 1832 is important because it is in force at the present day, and because it explains the only possible way in which the Act of 1884, by extending the

Borough franchise, may incidentally have the effect of restricting the County franchise. And the same rule holds good to this day, so that a tenement situated in a Borough will not confer a Borough and a County vote on the same person; but if it fail to confer a Borough vote on the freeholder, then he will be entitled to a County vote.

In other words, occupancy and residence are *sometimes* a disqualification for a County vote; but non-occupancy and non-residence are *always* a disqualification for a Borough vote in respect of any sort of tenement whatever.

The next change was in 1867. Then, the Representation of the People Act (30 & 31 Vict., c. 102), besides extending the ownership franchise by reducing the required values from £10 to £5, also introduced new forms of occupation franchise, both in Counties and in Boroughs. The Chandos Clause of the Reform Act of 1832 had introduced for the first time an occupation franchise in Counties by giving a County vote to the occupying tenant who paid £50 rent per annum. This form of franchise, though not actually repealed, was practically superseded by the Act of 1867 (sect. 6), which gave a County vote to the tenant who occupied a tenement rated at £12 per annum and paid his rates.

The Act of 1867 also introduced two new forms of occupation franchise in Boroughs: firstly, the *household franchise*, for which it was merely necessary to occupy as owner or tenant a separate dwelling-house separately rated to the relief of the poor: there was no specified value or amount of payment required; but it was necessary to have occupied the house for at least one year ending July 31st, and to have paid by July 20th all rates due on the preceding Jan. 5th (sect. 3).

The Act of 1867 also introduced for the first time the *Lodger franchise*. This also was and is a strictly residential franchise. Like the household franchise, it applied at first to Boroughs only. The lodger, in order to claim as such,

must have resided in the same lodgings for at least one year ending July 31st, and the room or rooms must be of the clear yearly value (unfurnished) of £10 (sect. 4).

The 'next alteration was by the Act of 1878 (41 & 42 Vict. c. 26), which amended the Act of 1832 by extending the £10 occupation franchise (in Boroughs) to *part* of a tenement (sect. 5).

The same Act of 1878 also amended the Act of 1867 by allowing the lodger to change his rooms in the same house without losing his vote (sect. 6), and also by extending the lodger franchise (in Boroughs) provided the unfurnished value for which they paid rent was at least £10 per lodger (*ibid.*). It also (sect. 7) substituted July 15th for the 31st in the case of both the householder and the lodger. Thus until 1884 the distinction between the County and Borough franchises was even more marked than it is now. The household and lodger votes were entirely limited to Boroughs, and the requirement for the occupation franchise was higher in Counties than in Boroughs. Thus, large classes of people were enabled to vote in Boroughs who would not have been qualified to vote for a County constituency. And therefore, previous to 1885, the disfranchisement of a Borough did not mean merely the merging of the Borough electors in the County constituency: it meant that the Borough electors were disfranchised altogether; except those few who were County electors already, and those few whose Borough qualification was high enough to entitle them to become County electors.

Thus the Act of 1832 disfranchised 56 English Boroughs absolutely, and the Act of 1867 disfranchised 4 English Boroughs absolutely, with the consequences above described as regards the electors.

In 1884 it became increasingly evident that if the basis of democratic government be the rule of three or the rule of five, or any other rule, the impending Redistribution Bill

would have to disfranchise a large number of Boroughs, and that whereas all the recent tendency had been to enfranchise, it would not be expedient to disfranchise even small classes of electors.<sup>1</sup>

Although the Acts of 1884 and 1885 are the authority for the greater part of the existing franchise law, they did not introduce a new species of vote. The ownership franchise has already been summed up by the Act of 1867, subject to the restriction already mentioned on "fagot voting" by the Act of 1884.

The only sweeping changes made by the Act of 1884 (48 Vict., c. 3) were the extensions of certain forms of Borough franchise to County constituencies.

Thus, the £12 occupation franchise, first given to Counties in 1867, is now extended by reducing the requirement of £12 to £10 (sect. 5). Again (*ibid.*), the Borough franchise created in 1832, arising from the occupation of *buildings and business premises* worth £10 per annum, is now extended to *all* premises of the same value in occupation (any land or tenement). Thus two old franchises, the one in Boroughs and the other in Counties, are now amalgamated in both kinds of constituencies; the only difference being that in Boroughs the old rule about six months' residence a year within seven miles of the Borough still applies, whereas in Counties no residence is required for the purely occupation vote.

But the most important innovation of the Act of 1884 is the extension of the above-described purely residential Borough franchise to Counties. This purely residential vote consists of the household franchise (of which no specific value need be specified) and the £10 lodger qualification (sect. 7).

The household and lodger franchises have undergone

<sup>1</sup> In point of fact, the Redistribution Act of 1884 disfranchised absolutely 79 English Boroughs and reduced by one apiece the representation of 36 others.

little change in the process of extending their *venue*. There is, however, a slight change made in the household qualification by the Act of 1884 (sect. 3), namely, its application to dwellings occupied in virtue of any service, office or employment, provided that the dwelling be not occupied by the employer of the person claiming the vote.

By sect. 6 a man may not vote at a County election in respect of the occupation of any tenement situate in a Borough. In other words, the same tenement will not confer more than one vote on the same person. There is a similar provision in the Act of 1832: for by sect. 24 of that Act a freehold, and by sect. 25 a leasehold situate in a Borough, cannot confer a County vote on the occupying owner. But if the freeholder be not entitled to an occupation vote, he will be entitled to an ownership County vote.

By sect. 12 of the Act of 1884 and the Schedule appended thereto, the Chandos Clause of the Act of 1832 creating the £50 rental qualification is expressly repealed. Another part of the same Schedule expressly repeals the £12 (rateable value) occupation County franchise of the Act of 1867.

The history of the occupation franchise in Counties is as follows:—The £50 rental qualification of 1832 is practically superseded by the £12 rateable value franchise of 1867; both are expressly repealed by the Act of 1884, and superseded by the extension of the £10 occupation franchise to Counties.

Curiously enough, the Chandos Clause, repealed by the Act of 1884, is repealed over again by sect. 11 of the Registration Act, 1885 (48 Vict., c. 15). This section of the Registration Act we venture to think badly drafted. The £50 rental vote is described by the Statutes of 1832 and 1884, and also by the Warden of All Souls as an occupation vote. And yet sect. 11 of the Registration Act says that a £50 rental voter “shall be registered as an occupation voter and not as an ownership voter”—

thereby implying a doubt as to the previous nature of the repealed qualification. But the question is a purely academic one: whatever doubt there may have been is now set at rest as the Chandos Clause no longer exists; and the whole of the existing law of the County occupation franchise is based on the Act of 1884.

However, it is impossible not to agree with the complaint of the Warden of All Souls in the *Law Quarterly Review* of January, 1885, that the Act was framed according to the usual mode of modern legislation, by which reference is made to various other enactments, so that these must be examined in order to understand its effect and meaning.

To sum up the existing law, the ownership franchise is as follows:—Freehold in fee-simple or fee-tail of the annual value of 40s.; any sort of freehold, copyhold or sixty-year leasehold, of the annual value of £5; twenty-year leasehold of the annual value of £50. The latter must not be confused with the abolished £50 rental qualification.

The ownership vote is available for Counties only, even if the qualifying property happens to be situated in a Borough. The only exceptions to this rule are more apparent than real, namely, the four Parliamentary Counties of Exeter, Bristol, Nottingham, and Norwich.

The occupation qualification is as follows:—Occupation as owner or tenant of lands or tenements of the clear yearly value of £10, for which rates due Jan. 5th must be paid by July 20th in Boroughs; 6 months' residence per annum within 7 miles of the Borough is also required.

The residential occupation franchise is as follows:—Inhabiting a dwelling-house (or any part thereof) as owner or tenant, the dwelling-house being separately rated to the relief of the poor. Also, occupying as lodger a room or rooms of the clear unfurnished value of £10 per annum.

There are still a few extraordinary franchises outside the two great fundamental divisions of the ownership vote and

the occupation vote. These special qualifications are expressly retained by the Reform Act 1832 in those Boroughs in which the qualification as burgess or freeman already existed. The most peculiar instance of this form of franchise is the freedom of the City of London, in which case the voter must be a liveryman of one of the City Companies (sects. 32 and 46).

There is one other special form of franchise outside the two great fundamental divisions—namely, the University franchise. This franchise belongs to *members* of the Universities who have taken at least the degree of Master of Arts, and who are not subject to any legal incapacity or disqualification. The exercise of this franchise is not subject to the Ballot Act 1872. Thus it may be either by open vote in convocation, or by ballot, or by means of a special ballot sent by an absent member from a distance if duly witnessed by a justice of the peace.

At an University election the Vice-Chancellor presides as returning officer, the writ for the election is read out, and the candidates are openly proposed and seconded. As soon as the election has been made, an indenture is made out to that effect between the Vice-Chancellor and the Chancellor, Masters and Scholars of the University—signed, sealed and witnessed; and the return is then made to the Crown Office in Chancery.\* In the event of a contest, the election is protracted for five days, like other elections previous to the Ballot Act.

In the University of London, Batchelors of Arts of three years' standing are members of convocation, and therefore entitled to vote (if not subject to disability).

The exercise of the franchise in the Universities of Oxford, Cambridge, and Dublin, is governed by the Universities Elections Act 1861 (24 & 25 Vict., c. 53); and that of London University by sects. 41—45 of the Representation of the People Act 1867. Such is the Franchise law of

England and Wales. That of Ireland is practically the same, being for the most part an extension of the English law. In Scotland the whole history of the Franchise has been different, both as to Counties and Boroughs: it has only been brought partially into something like conformity with the English law by recent Acts.

It remains only to make a few miscellaneous remarks. The right to vote is a personal and not merely a political right. This was decided in the case of *Ashby v. White* (1705), an action brought by a voter against the returning officer at an Aylesbury Borough election for refusing to let him vote. On appeal from the Court of Queen's Bench, the case came before the House of Lords as a Court of appellate jurisdiction. The House of Lords held that, although the House of Commons had the right to try disputed returns, and hence incidentally an elector's claim to vote, yet an elector had a Common-law right to vote, cognisable by the Common-law Courts, even though the candidate for whom the plaintiff would have voted was elected.

The incapacities and disqualifications are as follows:— Infants are disqualified by an Act of 1695 (7 & 8 Will. III, c. 25, s. 7). Women are excluded by the Common law, and also by the Acts of 1832 and 1867, as understood by the Court of Common Pleas in the case of *Chorlton v. Lings* (L. R., 4 C. P. 374). The same decision was arrived at by the House of Lords in the case of *Nairn v. University of St. Andrews* (L. R. [1909], A. C. 147). Idiots are excluded by the Common law. A lunatic would not be excluded, unless either he were so found on inquisition, or he were obviously unfit to be at large. Peers are disqualified by resolutions of the House of Commons, also by the Common law, as understood by the Court of Common Pleas in the case of *Earl Beauchamp v. The Overseers of Madresfield* (L. R. [1872], 8 C. P. 252).

The Act of 1867 disqualifies a paid agent or canvasser



from voting in the constituency in which he is thus employed (30 & 31 Vict. c. 102, s. 11). By the Ballot Act 1872 a returning officer has no vote in the constituency in which he is thus employed, except a casting vote (35 & 36 Vict. c. 33, s. 2).

By the Felony Act 1870 a person convicted of treason or felony may not vote until he has either served his sentence or received a pardon (33 & 34 Vict., c. 23, s. 2). A person convicted of a "corrupt" practice at an election (*e.g.*, personation or bribery), is disqualified from voting in any constituency for seven years; but a person convicted of a merely "illegal" practice is disqualified for five years in the one constituency only (46 & 47 Vict., c. 51, ss. 6 and 10). By the Acts of 1832 (s. 36) and 1867 (s. 40) receipt of parochial relief within the last year is a disqualification for even being on the voters' register. As a rule a person has a right to vote if his name is on the register, and certainly not otherwise. Hence it is necessary to draw an important distinction, as follows:—If a person expressly disqualified by statute has somehow got his name on the register, it will be the duty of the returning officer to refuse him a vote: but if a merely non-qualified person lacking the necessary qualification has been registered by mistake, his vote may be recorded, subject to rejection on petition.

A very common mistake, frequently made by people who are supposed to understand the franchise, is the failure to realise that the whole country is divided into Counties, and that consequently a Borough town is no less part and parcel of the County in which it is situated than any other town or village.

It is necessary to bear in mind the distinction between the ownership and the occupation vote, and to realise that the old distinction between the County and the Borough franchise still holds good, at least to this extent—that

an ownership vote is necessarily a County vote, and that a Borough vote is necessarily an occupation<sup>1</sup> vote.

It has been stated, that a Borough freeholder has a vote in the nearest—or worse still, in the adjacent County Division. As a matter of fact, the Borough freeholder has his vote in the very County Division in which his Borough freehold is situated. What else? Thus it may surprise some to know that the City of London is in the Hornsey Division, that Westminster is in the Ealing Division, that the whole of Liverpool is in the Bootle Division, and that the City of Oxford is in the County Divisions of Mid-Oxon and North Berks: but should there be any doubt about it, *vide* the Redistribution Act 1885 (48 & 49 Vict., c. 23, Sch. 7).

The law is perfectly fair, for by sect. 24 of the Reform Act 1832 a man may not have two votes in respect of the same tenement, not even in two different constituencies.

A single case will illustrate the working of sect. 24 of the Act of 1832. In the Mid-Oxon Registration Court (1909) Mr. W. E. Fayers claimed an ownership vote in respect of his premises off Cowley Road. To this it was objected that Mr. Fayers occupied the premises as a shop, and that therefore he was not entitled to an ownership County vote, but only (if anything) an occupation Borough vote. In reply to the objection, however, it was pointed out that Mr. Fayers did not claim in respect of the shop front (which he admittedly occupied in the way of business), but in respect of the back tenement which was occupied by the shopman as a tenant at a rent: the claim was accordingly allowed.

Thus the same house may produce five varieties of votes for at least as many voters: there may be the ground landlord of the freehold, the leaseholder for a term of 60 years, the ratepaying householder, the business man occupying an office, and the lodger.

<sup>1</sup> Subject to the few exceptions already mentioned.

The sub-lessee (or assignee of a sub-lease) has no vote in respect thereof, unless it be an occupation vote.

It will be remembered that the ownership vote was first extended to leaseholds by the Act of 1832.

By section 24 the occupier of his own freehold, and by section 25 the occupier of his own leasehold may not vote as such in the County election, if he be entitled to the Borough qualification. But here it is necessary to draw a distinction, as follows:—By section 24, a freeholder has no vote in a County election in respect of property for which *he himself* is entitled to the Borough qualification.

By section 25, a leaseholder has no vote in a County election in respect of property for which *either he himself or anybody else* is entitled to the Borough qualification. Thus the freeholder is still in a better position than the leaseholder, as the latter may sometimes be disqualified altogether. This does not seem to be generally known. Even the Warden of All Souls would rather seem to imply the contrary:<sup>1</sup> and such a mistake is actually perpetrated in the excellent work by Fane and Graham.

By sect. 20 of the Act of 1832 a sub-lessee or assignee of a sub-lease originally created for (at least) 60 years and worth £10 per annum, may vote, if in occupation of the premises. Sect. 5 of the Act of 1867 says nothing about the sub-lessee or the occupation, but merely reduces the £10 to £5.

In *Chorlton v. Stratford* in 1871 (L. R., 7 C. P. 201), it was held that the two sections of the two Acts must be taken together, and that therefore the sub-lessee or assignee of a sub-lease, originally created for 60 years and worth £5 per annum, may vote if in occupation. It was also decided that the requirement of the sub-lessee being in occupation, was for the reason that "great abuses might result from splitting up the term for the purpose of creating votes."

In other words it was held in 1871, that sect. 20 of the

<sup>1</sup> *Law and Custom of the Constitution*, 4th edit. (1909), Vol. I, p. 106.

Act of 1832 still held good *mutatis mutandis*; and that the only *mutata* were the all-round reductions of £10 to £5.

To what extent is *Chorlton v. Stretford* good law at the present time? Merely as giving effect to a restrictive rule preventing the creation of fagot votes by means of subleases: for the vote conferred on the sub-lessee in occupation is practically superseded by the extension of the occupation (household) franchise to Counties by the Act of 1884. The Franchise law of England and Wales is identical. In Wales, however, there are no Parliamentary County Boroughs. The Welsh District Boroughs are Borough constituencies absolutely, and have only the Borough franchise, and are themselves parts of the Counties which contain them. Thus there is an essential difference between the Parliamentary Borough of Taunton and the City of Exeter: the former is in the Wellington Division; but Exeter is itself a County and has the full County franchise. There is no essential difference between Swansea Town and Swansea District: both are Borough constituencies and as such have only the Borough franchise; both form part of the County of Glamorgan, the former in the Gower, and the latter in the Mid Division.

Without entering on vast fields of speculative inquiry, let us briefly consider the proposal to abolish plural voting. Those who would abolish plural voting must have felt sincerely grateful to the Hereditary Chamber for wiping out the proposals of Mr. Lewis Harcourt in 1906, thereby enabling enterprising jurists to start the problem over again on a clean slate. But to the present writer it has seemed an extraordinary thing that, experimenters in gerrymandering should have failed to hit upon the very easy and simple expedient of reviving the old law which existed from 1432 to 1774, and which required residence as a *sine qua non* for the franchise. If residence was required for the franchise, plural voting would be obviously

impossible, for the simple reason that one cannot reside in two places at once.

Perhaps, however, the answer is not far to seek. The idea of making residence essential was at least impliedly contained in a somewhat drastic proposal put forward by the late Sir Charles Dilke in 1906, namely, to abolish the ownership vote altogether. But in April, 1910, Sir Charles Dilke said that he would not abolish the ownership vote, because there were 2,000 electors (presumably his supporters) in his constituency whose only qualification was for the ownership vote.

As those who confuse both public and private justice with party expediency have as yet failed to put forward any constructive proposal that will bear investigation, it should not be necessary to defend plural voting on its merits. Let it suffice that the principle of one man one vote should apply, as it already does, in any single constituency. It should be remembered that the representation is not only of the whole country, but also of constituencies and local interests.

It may well be asked what difference it can possibly make to anybody in Oxford what an elector does in Buckinghamshire; and whether it is expedient that local interests should be even partially disfranchised; whereas even the Act of 1832, which abolished the rotten Boroughs, safeguarded vested interests. It is indeed possible to add up an aggregate party vote of all the constituencies, and express the result on paper (thereby including some votes twice over); but such a result of political arithmetic has no legal importance, no practical value.

R. L. MARSHALL.

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## II.—SCARLETT AND HIS METHODS.

THE greatest verdict-getter that ever practised at the English Bar was James Scarlett, afterwards Lord Abinger. Innumerable testimonies to his extraordinary skill and success as an advocate are to be found in contemporary literature. Though he was not a great lawyer, his successes amazed his associates at the Bar. "It really was impossible," said Lord Brougham, "to figure anything more consummate than this great advocate's address in the conduct of a cause. . . . His sagacity, his sure tact, his circumspection, his provident care, his sudden sense of danger to his own case, his instantaneous perception of a weak point in his adversary's case, all made him the most difficult person to contend against that perhaps ever appeared in Westminster Hall, when the object was to get or prevent a verdict." And to get the verdict was his one and only object. This end he pursued with matchless tact and consummate skill. He never showed any desire to produce a brilliant effect or to win applause for himself. He directed all his energies and sacrificed every other consideration to secure the verdict.

The qualifications required in a leader in jury trials are, as Brougham once said, very much the same as are required in a leader in war. Those qualities Scarlett possessed in the fullest degree. He had perfect quickness of perception and decision, imperturbable self-possession, and a thorough knowledge of human nature. He excelled both in his conduct of a case and in his powers of speech. As Brougham said, conduct without eloquence is safer to trust to for the victory than eloquence without conduct. He cites in proof of this the cases of Lord Wallace and Lord Loughborough. Wallace, he said, was a successful *nisi prius* advocate, with hardly any powers of speech; Wedderburn, afterwards Lord Loughborough, had but little success though a very fine

speaker. But Wallace was an excellent lawyer and a good leader of a cause: Wedderburn was an indifferent conductor of a cause, and had so little law, that it was said of him, that what he took in on the circuit at York had run through him before he got to Newcastle.

Scarlett possessed both Wallace's abilities in conducting a case and Wedderburn's powers of fluency and persuasion. His influence was almost as great with the judges as with the juries. His power over Lord Tenterden was so marked as to become the subject of complaint at the Bar. Campbell records in his *Lives of the Chancellors* that it used to be jokingly said that Scarlett had invented a machine by the secret use of which in Court he could always make the head of the judge nod assent to his propositions, whereas his rivals, who tried to pirate it, always made the head of the judge move dissentingly from side to side.

The question may be asked, how was it that Scarlett was so successful in his advocacy? What was his secret? Fortunately in his autobiography, published in *The Memoir of Lord Abinger* by Mr. Peter Scarlett, he has revealed to us some of his magic. Moreover, there are to be found in the writings and biographies of some of his contemporaries various passages in which Scarlett and his modes of advocacy are described. In the following pages the present writer has endeavoured to give some account of his methods and habits, and thus to throw some light on his remarkable success.

(1) In his opening speeches he confined himself to a clear and lucid statement of the facts. He always singled out with consummate judgment the leading facts in favour of his client, and then placed them with singular clearness before the Court, and in the way most likely to help his case. Both judge and jury were forced to look at them, whether they would or no. Matters of minor importance, though in themselves favourable to his client, he passed

over altogether. "I made it my business," he said, "to know and remember the principal facts, to lay the unimportant wholly out of memory, to open the case, if for the plaintiff and when I expected evidence for the defendant, in the shortest and plainest manner, with no other object than to make the jury comprehend the evidence which they would shortly hear."

(2) He did not anticipate the defendant's case. "I very seldom thought it necessary," he said, "to make any anticipation of the defendant's case. It is indeed oftentimes dangerous to do so, as it leads the judge and jury to seek for support of it in the plaintiff's evidence."

(3) He never exaggerated. He knew how important it was that the evidence should not appear weaker than the opening. No error, he said, is more fatal to an advocate than exaggeration. And again, he said, "I made it a rule in general rather to understate than overstate facts I intended to prove. For whatever strikes the mind of a juror as the result of his own observation and discovery, makes always the strongest impression upon him, and the case in which the proof falls much below the statement is supposed for that very reason not to be proved at all."

(4) He always avoided, except when he could not help it, matters involving professional technicalities; but when obliged to deal with them, he displayed a remarkable aptitude for so popularising them as to make them intelligible to the plainest and most unsophisticated mind. It was said of him that no man at the English Bar ever contributed so much as he did to make jurymen lawyers.

(5) He never made fine speeches or wandered from his case. He rejected all jest, or ornament, or sarcasm, that did not fall directly in his way, and seem to be so unavoidable that it must strike everybody who thought of the facts. "I never made a speech," he said, "with a view to my own reputation, nor for any other subject than to



serve my client." He never used his addresses as pegs for purple patches, or fine metaphors or elegant quotations. He knew that a fine speech is not necessarily a good one from the client's point of view. He himself cites as a proof of this Mackintosh's famous speech for Peltier, who ought to have been acquitted. If Scarlett had appeared for Peltier, he would not have made, like Mackintosh, a speech that has been handed down as a model of eloquence, but he would have secured the acquittal of Peltier, which, after all, should have been the object of his advocate.

(6) He cross-examined but little. "I learned," he said, "by much experience that much more mischief than benefit generally results from cross-examination. I therefore rarely allowed that duty to be performed by my colleagues. I cross-examined in general very little, and more with a view to enforce and illustrate the facts I meant to rely upon than to affect the witness's credit, for the most part a vain attempt."

(7) He paid great attention to re-examination. In that he was exceedingly skilful.

(8) He never took notes of the evidence. "As the evidence proceeded," he said, "I bestowed much too anxious attention upon it to take a note. I treasured up the facts in my memory, and arranged them in such a way as I thought would lead most distinctly to the conclusion I desired."

(9) He always kept a strict watch over the judge. Brougham says that, when leading the Northern Circuit, he used to choose his seat second to that to which he was rightfully entitled by his professional rank. He preferred to take his seat on the judge's left, because standing there he had the judge always in his eye as he spoke, and could shape his course with the jury by the effect which he found that he produced on the judge. He was not above studying the personal peculiarities of the judges and

shaping his treatment accordingly. In Chapter XIX of his autobiography, in which he describes Lord Ellenborough and Lord Tenterden, he lets us see how assiduously he had cultivated the art of managing those eminent men.

(10) He never allowed himself to be bullied by the judges. Lord Tenterden, the Chief Justice, was rough and discourteous. Frequently when counsel were doing nothing to provoke his anger, he would address them in a tone which a gentleman would hardly use towards an offending menial. Even Brougham was tame and submissive before him. But Scarlett was a remarkable exception to the general submissiveness of the Bar. Before him, as Thesiger says, the despotism of the Chief Justice seemed to stand rebuked, his roughness was smoothed, his violence tamed, and his whole nature appeared to undergo a complete transformation.

(11) Scarlett attached great value to the reply. His concluding speeches were short, crushing and conclusive, and it was by his last words that he achieved many of his greatest triumphs. "A dissection of evidence," he said, "to be masterly must be short as well as acute." In his autobiography he describes his custom at the conclusion of a case. "By the time the defendant's case was closed," he says, "the topics for reply were arranged in my mind. I had sifted the material facts from the chaff, and held them fast in my memory, stored in their proper places. I had observed the facts that appeared to make the most impression upon the jury either for me or against me. My reply was in general short, vehement, perspicuous, and directly to the point. Very often when the impression of the jury and sometimes of the judge has been against me on the conclusion of the defendant's case, I have had the good fortune to bring them entirely to adopt my conclusions. Whenever I observed this impression, but thought myself entitled to the verdict, I made it the rule to treat the impression as very

natural and reasonable, to acknowledge that there were circumstances which presented great difficulties and doubts, to invite a candid and temperate investigation of all the important topics that belonged to the case, and to express rather a hope than a confident opinion upon a deliberate and calm investigation I should be able to satisfy the Court and jury that the plaintiff was entitled to the verdict. I then avoided all appearance of confidence, and endeavoured to place the reasoning on my part in the clearest and strongest view, and to weaken that of my adversary; to show that the facts for the plaintiff could lead naturally but to one conclusion, while those of the defendant might be accounted for on other hypotheses, and when I thought I had gained my point I left it to the candour and good sense of the jury to draw their own. This course seems to me not to be the result of any consummate art, but the plain and natural course which common sense would dictate."

(12) He avoided unnecessary repetition. Frequent repetition of the same facts or arguments, he said, not only fatigues the attention, but weakens their force by awakening a suspicion that the speaker feels that he has made no progress by stating them, and that there is little else in the case.

(13) He never showed any resentment or obstinacy, when the judge or jury were against him, or treated their prejudices as devoid of all rational foundation. The natural consequence, he said, of treating the opinion of a man as unreasonable is to set him upon finding reason to support it.

(14) Whenever he discovered any error in point of law in the grounds on which his opponent based his case, he did not make merely a passing exposure of the error, but dwelt upon it at such length and with such earnestness that even the Court itself was sometimes led to magnify its importance.

(15) He did not prepare his speeches. "I not only re-

nounced previous composition," he said, "but scarcely ever in thinking over the subject I was to speak upon clothed a thought with words, certainly with no words that I ever remembered afterwards, and I never found a want of words, when I had thoughts or arguments to utter. *Provisam rem verba sequuntur.*"

(16) He was, though naturally irritable, completely master of his temper. He was always entirely self-possessed, however much appearances were against him, and was hardly ever thrown off his guard by anger or vexation. Habit became a second nature, and he had all the external aspect and much of the reality of a placid good humour, though this was drawn over a somewhat sensitive interior.

(17) Whether the case was trifling or important, he always took the same pains for his client, and seemed to be equally interested in the result. When he was engaged in a cause his services might always be relied upon. He never adopted the practice of wandering from Court to Court and taking contemporaneous briefs in all, to the injury of those whose interests he had undertaken to attend to.

(18) He had a magical influence over juries. "When Scarlett is addressing a jury," said the Duke of Wellington, "there are thirteen jurymen." He treated the jury with a pleasant familiarity which flattered and hypnotised them. There was no resisting his seductive smile. Soothing and flattering them, he produced an impression upon their minds which they often felt indignant at his opponents attempting to efface. He looked at them, it was said, quite in the "How do you do" style, as if he had been on terms of particular intimacy with each and all of them all his life. His usual practice was to fold up the sides of his gown in his hands, and then, placing his arms on his breast, smile in their faces from the beginning to the end of his address, talking all the while to them as if he were

engaged in a mere matter of friendly conversation. Francis Massey Dawson, a barrister of his circuit, said that he spoke as if he and the jury were on the best of terms and were ill-used by the rest of the world. He used to single out in *nisi prius* cases the jurymen whom he thought the most intelligent and the most likely to influence the others when deliberating on the verdict they should return. To the person so singled out in his mind, he addressed himself almost as exclusively as if there had been no such person as a judge in Court or any other jurymen in the box. The jurymen naturally felt proud of his being thus distinguished from the eleven in the jury box with him, and was consequently in much better condition to receive the impressions which the advocate wished to produce on his mind. Whenever Scarlett saw that he had succeeded in seducing over one intelligent and influential jurymen to his side, he immediately set to work in the same way with the person whom he supposed the next best for his purpose. If the case of his client was a bad one, and the evidence adverse to his interests, he would, after he had seen by the assenting expression of the second jurymen's countenance that he also was proselytised to the view of the case which he wished the jury to take, fix on a third and repeat the process with him. Whether he contented himself with thus making secure of one, and trusting to that one's influencing the others, assisted by the impression his speech had made, or whether he singled out two or three, and addressed himself particularly to them, depended on the peculiar circumstances of the respective cases.

(19) His style as a speaker was simple in the extreme, but it was the simplicity of the highest art. As has been already stated, he never indulged in deep declamation or impassioned effusion. He never made stirring appeals to the emotions, or aimed at rhetorical flourishes. He used

no figures or metaphors. He never soared so high as to lose sight of the ground, says Brougham, and so never feared to fall. But simple and plain as his oratory was, it was the result of careful cultivation and self-control. This was proved by an incident in Parliament in March, 1824, when he replied to Lord Eldon's attack upon Abercromby. In his excitement he forgot the measured compass of his long adopted voice and manner, and spoke out in a broad northern dialect, which astonished the house. Like Brougham and Romilly and Mackintosh, and the other famous advocates at the beginning of the eighteenth century he had assiduously studied the works of the great Roman master of forensic eloquence. Writing of his earlier days, he says that he had eagerly devoured the writers of the Augustan Age, more especially Cicero, and that he had translated many of his orations into English, and back from English into Latin again. Brougham gives a proof of Scarlett's familiarity with Cicero by saying that the great advocate had called his attention to the remarks on the evidence and cross-examination in the speech for L. Flaccus. Brougham adds, "As a more consummate master of the forensic art in all its branches never lived, so no man is more conversant with the works of his predecessors in ancient times."

(20) He sometimes resorted to theatrical artifices in the conduct of his cases—a course which is not, however, recommended to modern advocates. Brougham records that on one occasion he defended a gentleman of rank and fortune against a charge of an odious description, and performed his part with even more than his accustomed zeal and skill. As soon as the judge had summed up, he tied up his papers deliberately, and with a face smiling and easy, and carefully turned towards the jury, he rose and said, loudly enough to be generally heard, that he had an engagement and that in so clear a case there was no occasion for him to await what must be the certain event. He then

retired deliberately, bowing to the Court. Brougham says that the prosecuting counsel were astonished at the excess of confidence, or of effrontery, which was displayed by Scarlett, and which was not lost upon the jury. But one of the juniors, having occasion to leave the Court, found that all this confidence and fearlessness had not crossed the threshold. Behind the door stood Scarlett, trembling with anxiety, his face as white as his brief, and awaiting the result of "the clearest case in the world" in breathless suspense.

Brilliant as was Scarlett at the height of his fame, it must not be supposed that he acquired his position at the Bar without labour and perseverance. In a book entitled *Criticisms on the Bar*, published in 1819, and written by one calling himself *Amicus Curiae*, there are some acute and candid remarks about Scarlett's faults. The writer says of him that in his earlier days he was a lover of technicalities, and that he not infrequently refined beyond the comprehension of the jury. But he goes on to say that, at the time when he wrote, Scarlett had in a great degree overcome that propensity. Again, the writer says of him, that in his earlier days he was deficient in fluency. His words it is stated, dropped out, two, three, or four at a time leaving painful intervals that much interfered with the impressiveness of his delivery. He is said also to have frequently destroyed the force of the beginning of his sentences by the awkward manner in which he concluded them. *Amicus Curiae* goes on to add that he had entirely conquered the first defect, and so far overcome the second that it was neither so common nor so obvious as it had been.

*Amicus Curiae* professes to find fault with Scarlett's conduct of cases even in 1819, when he had been for many years at the Bar. He charges Scarlett with doing what he specially condemns in his autobiography. He says that

he made too great an endeavour in his opening speeches to answer the case of his adversary, instead of relying upon and enforcing his own. The effect is, says *Amicus Curie*, that he occasionally raises ill-founded suspicions in the minds of the jurymen that he has not much confidence in what his own witnesses will establish. Nor was he, according to his critic, remarkable as a cross-examiner. His examinations and cross-examinations, says his critic, were not deficient in art or shrewdness, but they were not to be compared with those of Sir William Garrow or Lord Erskine; they wanted much of the intuition of the former, and of the humourous wheedling of the latter, by which he not infrequently convinced an adverse witness that he was his friend and not his enemy. *Amicus Curie* is for the most part an unfriendly critic of the barristers whom he describes, and some allowance ought perhaps to be made for this fact in his description of Scarlett. But he shows, at all events, that the great advocate only obtained his extraordinary skill and capacity gradually and by experience.

As a litigant, Scarlett did not display the acuteness and wisdom that he showed as an advocate. During the hearing of the Norwich Election petition, when Scarlett's seat at Norwich was challenged by the Whigs, his criticisms and suggestions reduced his counsel to such a state of nervousness, that they had to ask him to keep away from the committee-room. He found serious fault, amongst other things, with Thesiger, for omitting to ask a dangerous witness whether Scarlett did not distinctly say, "I will have no bribery." Had Scarlett himself been briefed on behalf of a stranger, he would have died rather than ask such a question. But lawyers, however subtle and acute, rarely retain a cool head when they are themselves the litigants.

It is perhaps not surprising that Scarlett's reputation as a



judge was by no means equal to his fame as an advocate. He had been so long at the Bar that the characteristics of an advocate had become part of his nature. As Lord Chief Baron of the Court of Exchequer he acquired no great judicial renown. He rarely presented more than one side of the case to the jury, and was consequently accused of bias and want of impartiality. He offended juries by his assumption of superiority, and they frequently refused to submit to his dictation. It is as an advocate not as a judge that Scarlett is remembered.

J. A. LOVAT-FRASER.

### III.—THE PLACE OF JURISPRUDENCE IN LEGAL EDUCATION.

THE true end of education is not merely the acquisition of knowledge; it is the development of the latent faculties of the subject—moral, intellectual and physical—the conversion of the child, fraught with unfathomable possibilities and unknown destiny, into a being which approximates as closely as individual limitations will permit to an objective ideal of human perfection.

This end is never attained, is incapable of attainment. Man is invariably cast on the waters of life before he has been trained to buffet the angry waves with perfect mastery. And this is in harmony with the genius of a world of baffled hopes and stifled aspirations, a universe of possibilities drowned in prosaic actuality. This we must accept as we yield to the laws of nature; the remedy is not in our power. But when we find that, owing to the incomplete comprehension of educational aims, a far lower degree of perfection is reached than might otherwise be attained, reform is possible—nay, imperative.

To this lack of comprehension of the meaning and

necessity of education is due the introduction of technical instruction into general education, a short-sighted policy which increases the importance of rendering technical instruction more educative. It was some such consideration as this that caused the inclusion of Jurisprudence in legal curricula. But it is on other grounds that this study must be defended at the present day. The only arguments that carry much weight with the self-styled practical man are those of a practical nature. The object of this essay is, therefore, to show the paramount importance of the study of Jurisprudence, especially to the practical lawyer, and to determine its position in relation to the other topics of legal instruction.

It has been said that the solicitor does not need a thorough theoretical knowledge of the law, that practical acquaintance with office work, coupled with business ability, will suffice. If the profession as a whole were to adopt this attitude, it would quickly sink to the low position which it held a hundred years ago; and as the prevalent opinion favours the opposite view, whether or no such knowledge is of great value to the solicitor, it is essential for the student. Any means of facilitating the assimilation of legal knowledge or rendering it more permanent should therefore be welcomed by the student. The study of Jurisprudence has both these advantages.

In early childhood, every attempt to inculcate general principles and to teach particular facts by deduction from memorised rules has ended in complete failure, and now meets with universal condemnation. The chief objection to this method lies in the inability of the undeveloped intellect to apprehend abstract truths. As education progresses, the abstract is reached through the concrete, and may even be comprehended, but the concrete makes a far more lively impression, is of greater interest, and is more easily remembered. In later stages of development, though the objection

to any system which dogmatically lays down general rules, without any conscious attempt to render them intelligible, applies with equal force, the universal becomes not merely the dominant factor in intellectual progress, but also the chief instrument in the assimilation of the particular.

All branches of technical instruction presuppose a certain degree of general education which has familiarised the student with abstractions, and consequently the objection to teaching by principles, unless artificially done, has no reference to legal education, the primary object of which is the acquisition of knowledge.

It is a well-recognised principle that a man who is interested in a subject will learn it far more quickly than one who is indifferent. Now if law is taught merely as a conglomeration of particular facts, it is impossible to arouse interest in the subject as a whole. Here and there a peculiar anomaly may arouse curiosity, but the emotion will merely be temporary. It is this defective method of exposition that has given rise to such expressions as "the dry bones of the law," which show a profound distaste for a subject believed, except for its immediate purposes, to be dead. A particular legal decision taken by itself, without reference to other legal principles, is of no value beyond the mere fact that it represents the law which will be enforced in a particular country, at a particular period of its existence, under a particular and possibly rarely occurrent combination of circumstances. But when legal decisions and enactments are regarded in the light of other legal doctrines, and their interdependence is manifested, when a legal principle is shown to have a significance far beyond spatial and temporal limits, to transcend petty municipal distinctions and to contain an element of universality and permanence, when they are seen to be essential moments in the evolution of the species, shedding a light on some of the most profound mysteries of human nature such as can be obtained from no other source, law stands revealed as a living study of vital human import.

That Jurisprudence really gives this insight, and thus stimulates a healthy and unfailing interest in law, may be stated without fear of contradiction. It is only the ignorant who can characterise law as artificial; whether we approach the subject on historical or analytical lines, we cannot fail to be impressed by the entire absence of the arbitrary in all branches except those which owe their origin to modern institutions and conditions. Historical Jurisprudence shows us law as a spontaneous growth, adapted to the needs of each community, containing common elements which, without conscious external direction, owe their similarity to those great facts of life and nature in which all the world are kin.

If Historical Jurisprudence is a branch of sociology, Analytical Jurisprudence is closely allied to psychology. The study of either arouses surprise at the vagaries of human nature, manifesting itself in so unpromising a sphere, succeeded by curiosity; pride of success follows the discovery of an unexpected connection between a hitherto unrelated legal maxim and the student's own store of knowledge. All these emotions stimulate interest and thus facilitate the absorption of knowledge.

If Jurisprudence is not taught, law is usually *learnt* as a mere aggregate of particular rules. It may be objected that this is not necessarily so; and that it is not *so taught*. Both these objections may be admitted. It is quite possible, and may sometimes happen, that a student of more than usual perception may act upon the principle that the best way to know is to understand, but this is not the case with the average student. The attitude of the latter may be represented as follows: "I have to get through my examinations; to do so I have to know what the law is in England to-day; it will take all my time to learn that; and consequently I cannot trouble with anything extra such as History or Jurisprudence." The consequence is that any scientific co-ordination or

historical explanation offered by the lecturer is as often as not treated as useless surplusage and as such neglected. And it must not be forgotten that it is the average student to suit whom primarily educational courses should be framed. If, therefore, the average student cannot or does not unaided arrive at the conclusion that the best way not merely to retain knowledge but even to acquire it, is to know the reason why, he must be taught ; and thoroughly to understand English law, it is not sufficient to know that the law to-day is so and so, owing to a development of such and such a principle, which falls within the scope of the History of English law ; it is necessary to know the ultimate why and wherefore of the adoption of the principle ; and this lies within the province of the Science of Law.

The assimilation of a general principle lightens the intellectual burden by substituting the simple process of deduction for laborious and painstaking investigation. The justification of the maxim that the teacher should proceed from the known to the unknown lies in the fact that, after the child has reached a certain minimum of sense-acquired knowledge, further acquisition proceeds mainly by the comparison of the new object or idea with the child's stock of knowledge, and the perception of similarity, the points of difference being subjects of cognition merely as *differentia* ; so that, while generalisation is nothing more or less than this perception of similarity, from another point of view it may be regarded as the means whereby discrimination, which adds to knowledge, is effected. It would seem to follow that the wider the generalisation, the more it will add to one's store of knowledge. Law is taught by principles, but these principles do not include a multitude of particulars. Jurisprudence, by introducing higher generalisations, each co-ordinating less sweeping truths, adds at once, not merely isolated judgments, but whole sets of principles. In addition, all classification and correlation

in the teaching of law must be done by the teacher, and the results must be placed in a completely digested form before the ordinary student ; while a student who has profited by a juristic training can and will generalise for himself, a course which will be far more beneficial and prolific in lasting results.

If a knowledge of Jurisprudence is of great assistance in acquiring legal knowledge, it is a more valuable aid to retention and recollection. I have already remarked on the peculiar interest that Jurisprudence adds to the study of law. This interest facilitates that concentration which is essential in order not to forget information once obtained. The laws of association might be termed the charter of Jurisprudence. The law of similarity may for our purpose be enunciated as follows : "The mind in the presence of an idea tends to recall ideas of a similar nature"; and the law of contrast may be formulated in similarly narrow terms : "The mind in the presence of an idea tends to recall ideas of an opposite nature." All generalisation, being based on identity and difference, emphasises similarities and contrasts so strongly as to hasten the reproduction of like and unlike mental states in an extraordinary degree. The law of contiguity states that the mind in the presence of an idea tends to recall other ideas with which it was formerly closely connected. In this law is to be found the *raison d'être* of classification. As John Stuart Mill said, "The end of classification is to make us think of those objects together which have the greatest number of important common properties." Classification forms a great, if not the chief part of Jurisprudence, and its study is to that extent justified by the principle of contiguity.

However well the practitioner may know the law, it is not of much use unless he can apply it properly. A scientific knowledge means thorough comprehension, and greater insight means greater power of application. This ability,

when recognised by the student, may be the source of real pleasure, the emotion of power, a feeling which cannot fail to render legal study an engrossing occupation, resulting with certainty.

But it is not on practical grounds alone that an important position is claimed for Jurisprudence in all courses of legal study. The profession of the law has always been regarded as extremely narrow, and the popular belief has not been entirely groundless. As compared with other professions, it must be admitted that the practice of the law, unless balanced by healthy tendencies or dissimilar intellectual interests, abnormally influences both character and mentality in an undesirable manner. Careful, and, it must be confessed, often somewhat blind and unthinking adherence to precedent, and constant observance of the technicalities which form an integral part of every legal system, however advanced, undoubtedly tend to warp the mind, and induce a blindness to the demands of justice and sometimes even convenience, which are the chief ends for which laws are framed. This is far less true than it was a hundred or even fifty years ago; and the improvement may be attributed in great measure to the liberal influence of a scientific conception of law. The status of the lower branch of the profession has improved in exact proportion to this advance, and I think it is no exaggeration to say that this is mainly due to the labours of Bentham, Austin, Sir Henry Maine, and the late Professor Maitland, not to mention foreign jurists, or the names of living workers, in that theoretical field which a certain type of mind ostentatiously affects to despise.

The foregoing considerations of the value of Jurisprudence should be of some assistance in forming an opinion on recent proposals for the reorganisation of the education of the lower branch of the profession. There is a widespread recognition of the inadequacy of the courses of study which

the Law Society may be said to prescribe, one result of which may be the inclusion at no distant date of Jurisprudence and Roman law as compulsory subjects for all articled clerks. Opinion, however, is far from unanimous even on the general question of the advisability of any such course; while there is room for great variety in the disposition of suggested curricula.

It has been proposed that in LL.B. courses, Roman law and Jurisprudence should be omitted in the intermediate and taken in the final examination, a suggestion which has been partially adopted at the Universities of Leeds and Wales by the transference of Jurisprudence only from the intermediate to the final course. There is no doubt that under this system, Jurisprudence will be rendered a more real and living study, and will be better understood, but many of the practical advantages of this subject detailed above will be to a great extent lost. The aim of this article has been to show the assistance afforded by even a moderate acquaintance with this science in subsequent legal study. The logical conclusion from these two considerations is, therefore, that Jurisprudence should be retained in its position at the commencement of the training, but that it should also be given a place later on in the curriculum. So far as the author is aware, the only English-speaking teaching body which adopts this course is the Panjab University.

As regards Roman law, valuable as it is in many other respects, it is chiefly as ancillary to Jurisprudence that it finds a place in these courses in this country. For this reason Roman law should also remain a first-year subject. It would not retain a place in subsequent study, as time must be found for a complete course in the History of English law, in which special attention would be paid to later periods of development.

The teaching of this subject is in such an unsatisfactory condition that one can only conclude that those who are



engaged in the teaching of or take an interest in this branch of legal study do not rightly appreciate the function of history. The criterion of the value of historical study does not lie in the pseudo-romantic interest attaching to the investigation of the traces of a bygone age, but rather in its practical utility in shedding light on our present condition or illuminating the path of progress. The history of law is no exception. It should be studied with regard no doubt to psychological view-points, owing to the interest afforded by the conflict of human emotion and will with external accidental limitations; but its function is to furnish an illuminating commentary on the law as we know it to-day. History may be said to supply the defects of reason; and studied in this light it will explain apparent anomalies, correct *a priori* miscalculations, interpret much that is at first sight so unintelligible as to be rejected by eminent scholars, and prove our law to be no mere conglomeration of arbitrary rules, but a definite system of natural and reasonable precepts formulated by men who had a thorough comprehension of the structure which they were erecting; and though this same structure is here and there out of harmony with the main design, these departures admit of a reasonable explanation which will render the whole intelligible. In other words, the History of English law, rightly understood, will be found to be a branch of General Jurisprudence; and its study will therefore render legal knowledge more readily acquired, more easily retained, and more certainly applied.

The following course of study may therefore be suggested:—

First year: (a) Elementary Roman law (*Institutes and History*); (b) Elementary Jurisprudence; (c) Elementary English law; (d) Logic or Political Economy or Elementary Psychology.

Second year: (a) Contracts and Torts; (b) Real and Personal Property and Conveyancing; (c) Elementary Equity; (d) Constitutional law; (e) History of English law.

Third year: (a) Real and Personal Property and Conveyancing; (b) Equity; (c) Private International law; (d) Jurisprudence; (e) Criminal law and Procedure.

Candidates for honours should also be required to take two subjects, one from the following list:—

(a) Bankruptcy and Company law; (b) Evidence and Civil Procedure; (c) Commercial Contracts;

and the other from the following:—

(a) Public International law; (b) Advanced Roman law; (c) Comparative law.

The Elementary English law mentioned among the first-year subjects perhaps needs a word of explanation. Such a course is included among the first-year subjects at Leeds University, and comprises the first three volumes of Stephen's *Commentaries*. The author does not wish to be considered as specially recommending Stephen; he merely mentions it in order to give some idea of the extent and character of the suggested course.

This method has two advantages. In the first place, a general survey of any subject should precede the detailed study of any of its branches. The student is thus enabled to grasp the subject as a whole, to perceive the relation between each particular branch, and to carry the whole scheme in his head without difficulty, so that each item of the more detailed knowledge which he may subsequently acquire is at once properly related and classified, confusion becomes impossible, retention is facilitated, and the power of application is increased.

Secondly, by taking the course in the same year with Elementary Jurisprudence and Roman law, the study of Jurisprudence becomes more intelligible and interesting, and its bearing on the study of English law is more clearly seen; while the opportunity of comparing the English and Roman laws thus afforded, besides being the best possible illustration of the course in Jurisprudence, is of great assistance in learning and understanding, and therefore in remembering both of these systems.

It will be noted that Constitutional law is omitted from the first-year course. Though it should certainly be taught, it has not the same introductory value as Roman law and Jurisprudence, and is therefore the subject which must be postponed to a later year, in order to make room for the Elementary English law.

The principal other suggestion made in the above course is the compulsory study of Private International law. This is now a substantial and important branch of our law, and though no doubt its rules are taught as they occur in the other branches, this is insufficient. The justification which has been made since the Judicature Act 1873, for the study of Equity as a separate subject, applies equally to the teaching of Conflict of Laws. Like Equity, it is a separate body of law, developed on peculiar lines, the rules of which are unintelligible, and therefore difficult to remember when taken separately, but which become reasonable and comprehensible when learnt as part of the system, with reference to its history and the mutual interdependence of its rules.

It would be an improvement on the above scheme if the suggested course were preceded by an Intermediate course comprising English Constitutional History, Logic, Elementary Psychology, Ethics, Theory of Knowledge, Political Economy and Political Science. If this were done, Public International law might be substituted as a compulsory subject for the first-year Arts subject.

No doubt there are many who will disagree with this scheme on the ground that it is too theoretical. Admitted that now-a-days in the legal profession one must before all things be practical, we must remember that theory is often more practical than practice; for it enables us to acquire in a short time knowledge of practical value, which it would otherwise take us years of practice to obtain.

H. J. B. MARTIN.

#### IV.—THE ORIGIN AND HISTORY OF SUCCESSION IN ROMAN LAW.

IN dealing with the Law of Succession among the Roman people, one of the most fascinating and far-reaching subjects of ancient jurisprudence is unfolded, and we are carried back into the dim mist of prehistoric times. To reach the very genesis of the acts, which grew into customs, on which it is based, or, from which it sprang, one would have to seek into the habits, not only of the tribes that lived approximately prior to historical times, or the dawn of civilisation, but in the habits of ancient primitive man and the dawn of human intelligence itself.

However interesting such an excursion into antiquity might be, its conclusions would, of necessity, be extremely speculative. It is sufficient, for the present purpose, to confine attention within the realm of authentic history, or at least within a realm of facts from which one may draw reasonable conclusions as to the state of human relationship even before authentic history begins.

The early Roman people were composed of a union of the Latins and the Sabines, together with a small contingent of Etruscans. Some of the later writers,<sup>1</sup> however, claim that

<sup>1</sup> T. M. Taylor, *Const. & Pol. Hist. of Rome*; H. F. Pelham, *Outlines of Roman History*.

the latter were not a factor in its composition. They necessarily brought to the union customs and usages which differed as widely as their different social characteristics. The assimilation of these customs to each other and the crystallisation of the results into a legal system, must have taken a great many years, so that there is no reason to believe that, in the earliest times, any definite universal system of private law existed. The relations between individuals were governed almost entirely by usage, while between the individual and the State the powers of the King were supreme.

While the customs of the various elements of this society undoubtedly differed widely in many respects, yet as the Latins and Sabines, and to some extent the Etruscans, were descended from the same Indo-European stock they inherited the same primitive ideas, at least about religion and government. These inherited ideas, before the union, had developed in a marked degree, and distinguished the Latins for their characteristic sense of the importance of discipline and homage to power and government; the Sabines for their deep sense of religious feelings and their marked reverence for their gods; the Etruscans for their subservience to forms and ceremonies in all matters both human and divine. It is the re-combining of these distinguishing elements in the three peoples, after years of separation from their common parents, that we get the first authentic glimpses of their combined characteristics and assimilated customs as a basis for the development of the *Jus Civile*.

For the purposes of this article, however, we are interested in only one branch of this great system of laws—viz., the law of succession, except in so far as it may be necessary to consider kindred subjects for better elucidation of our topic in hand.

With this in view let us divide the subject, and treat it

under two heads: testamentary succession; and intestate succession. This, or any division of the general subject, naturally suggests the question which should have priority of consideration as a matter of convenience of treatment and historical sequence. To the student of Civil law, the above arrangement may seem somewhat unorthodox.

The writer is quite aware that the almost, if not quite, universal division made by writers on the subject gives prior historical sequence to intestate succession, but presumptuous as this may seem to run counter to such opposition, after careful consideration and personal observation of many primitive customs, it is incumbent to challenge at least their position. Moreover, in attempting to maintain the position that, historically, testamentary succession should be accorded prior sequence, use will be made of not a few quotations from these same authorities who adhere to the opposite view, showing their own tendencies toward the position herein assumed—or, at least, that they are not secure in their own, yet dogmatically asserting it.

On one point all writers unanimously agree—viz., that the all-important point in a Roman testament, from the earliest times, was the appointment of an heir: an universal successor. With this we are quite in sympathy, and, moreover, it seems that in this we have the key to the entire situation, and, had they followed this theme to its logical origin, they might have arrived at quite an opposite conclusion. To elucidate our meaning more clearly, let us digress somewhat and consider the civil and religious construction of the Roman family, at the time we get our first historical view of it, and compare it with other types, within the same known degree of civilisation, with special reference to the religious system in vogue.

The oneness of the Roman family is a peculiar outgrowth of primitive marriage by capture in the first instance,

tempered, as we have seen, by the Latins' characteristic sense of the importance of discipline and homage due to the power of the captor, developed into a complete unit composed of all the members—natural, adopted or slaves—of the household of the "paterfamilias," and under his power as such. It will not be necessary at this point to consider the civil relationship of the family, except, indeed, so far as the appointment of the heir may be considered civil in contradistinction from religious. The paterfamilias was, from earliest times, not only the civil head of the family, but its religious head as well. It was he who offered family prayers and was the high priest who made the sacrifices at the family altar to the gods on behalf of both himself and his family. The very nature of ancestor-worship made him the religious head of his little community. It was his own father, grandfather and other ancestors who were the gods of the household, and being next-of-kin, and being possibly looked upon, in many instances, as a god himself, he was the natural go-between, and the one most likely to gain attention as being best acquainted with the ancestral god. Of course the Romans had multitudinous national, tribal and other gods, but it is not pertinent to consider them here. To arrive at a tolerably clear conception of the institution of an heir, it is only necessary to remember that, in a primitive stage of ancestor-worship, the immediate predecessor was the only, or at least the most important object of worship as a god.

In such a system it will be readily seen that a successor to the paterfamilias was a religious necessity, and the failure of such would be a dire calamity; hence every precaution was taken that no vacancy should occur, even going to the extent of creating an artificial successor by adoption. The very reason, then, of marriage was to rear sons who might perpetuate the family religious rites. The natural order of

course would be the first-born son who probably succeeded as a religious necessity, at first in case there were no other sons, and probably without any special ceremony other than the religious necessity, *i. e.*, a religious "*heres necessarius*." But it might happen that the oldest son died or was considered incapable of performing the necessary functions of successor or heir, and it would be expedient to appoint another in his place. Here I take it, in case the oldest son was still alive and passed over as incapable or for what not reason, we have the first germ of the idea of adoption. Such a ceremony, in primitive times, under such customs, would be a religious one, performed by the high priest of the family—the *paterfamilias*—in the presence of his entire family, and later as the family grew and through manumission other akin families grew and developed into the clan, in the presence of the whole clan. Thus far we have considered the appointment of the heir simply as a priestly or religious successor to the *paterfamilias*, without reference to the succession to property. This phase will be treated in due course. While we are on this subject of the appointment of a religious successor it may be well to consider this phase somewhat more at length.

In case of the failure of natural children, it might, as we have seen, be necessary, in order to perpetuate the religious family, to resort to the fiction of the adoption of even a perfect stranger. This adopted successor might be chosen from any other family that might consent to it. In the event that the person chosen was an "*emancipatus*," *i. e.*,—an emancipated son—he would, although unmarried and without children, constitute a legal family, and, if arrogated, would involve its extinction. While, in such a case, we see that this person has practically no religious family ties, and his appointment savours more of civil than religious form, yet even at a much later time than the more primitive we are



considering, because the arrogation involved the extinction of one family and perpetuated another and being considered a civil affair, such a proceeding must have the approval of the pontiffs, and on their favourable report, it was sanctioned by the Curiae. Here we see, although much later, with what tenacity the religious ceremonies maintained their ancient customs. Can we not in this discern the lingering early characteristic of the Sabines for religious feelings and reverence, together with the love for discipline and power of the Latins? And does it not almost, if not quite, prove that the civil customs grew out of the religious? In fact, so strong is religious superstition among primitive people, like the early Romans, that imitation very often becomes reality to them. For example, in case of adoption, Diodorus says that when Zeus persuaded his wife to adopt Hercules, the goddess assimilated his birth, and that in his own day the barbarians had the same practice. According to F. Liebrecht and Grimm the practice was not uncommon in the Middle Ages; and Stanislaus Ciszewski tells us that "At the present time (1897) it is said to be still in use in Bulgaria and among the Bosnian Turks." I have not found the reports of such cases among the early Romans, but as they borrowed much from the Greeks, and used many symbolisms, such as the "*testamentum per aes et libram*," I have no doubt that it did exist among them, and that, on diligent search, the records of them could be found. It is not important enough to this article to warrant the search, and is only mentioned here in an incidental way to show the trend of primitive minds like those of the Romans at the period of civilisation now under consideration.

Nor does the idea of a successor, to the primitive mind of the ancestor worshipper, only mean one who will succeed to the property of the deceased, perpetuate the family, and perform the religious rites. He is the universal successor,

*i. e.*, he not only represents the deceased on earth but is, to all intents and purposes, the deceased. Moreover, by a vague symbolic reasoning, while the deceased is supposed to be a god in the nether world, his soul is supposed to inhabit his successor. This idea, that the soul of a dying person may be transmitted to his successor, seems to be familiar to many primitive ancestor-worshipping people, including the Romans; and is apparently based on the belief that the breath is the soul, or at least the soul is bound up in some way with the breath, as the following cases will instance:—

“Among the Carrier Indians of North America, when a corps is buried, the priest pretends to catch the soul of the deceased in his hands, which he closes with many gesticulations. He then communicates the departed soul to the dead man’s successor by throwing his hands toward and blowing upon him. The person to whom the soul is thus communicated takes the name and rank of the deceased.”<sup>1</sup> Here they seem to go a step farther than the others inasmuch as the selection of the successor is apparently left to the divine inspiration of the attending priest. Likewise, Rosenberg tells<sup>2</sup> us, that “in Nias the oldest son usually succeeds his father in the chieftainship. But, if from any bodily or mental defects, the eldest son is disqualified from ruling, the father determines in his lifetime which of his sons shall succeed him. In order, however, to establish his right of succession that the son upon whom his father’s choice falls shall catch in his mouth the last breath, and with it the soul, of the dying chief.” It should be borne in mind that these people are ancestor worshippers like the Romans. Other cases might be almost indefinitely multiplied, but the following will suffice for our present purpose. Cicero *In Verr.*, II, 5, 45, and Servius on Virgil, *Aen.*, IV, 685, likewise tells us that the Romans

<sup>1</sup> H. Hale, *U.S. Exploring Expedition, Ethnography and Philology*, p. 203.

<sup>2</sup> *Der Malayische Archipel.*, 160.

caught the dying breath of friends in their mouths and so received into themselves the souls of the departed.<sup>1</sup>

These citations are made to show that the primitive ancestor worshipper, including the Romans, regarded their successor as something more than such in a worldly sense; but, on the contrary, that he actually took on the spiritual self of the deceased, and as the deceased became a god in the nether world, his successor not only represented him on earth, but in a vague sense, through receiving the spirit of the deceased, became endowed with godly attributes himself. This attained its fuller development later in the god-rulers of the Roman State, and the god-kings of Egypt and other countries. But, owing to the peculiar formation of the Roman family, the god-rulers never attained such colossal magnitude as they did, for example, in Egypt. Suffice to say, that we have reached a stage in our article where the primitive paterfamilias is at once priest of the family as well as its civil head, and in some sense endowed with godly attributes, through the possession of the soul of his ancestor, who is the immediate family god.

With this in view we are now prepared to proceed to the consideration of the probable origin of testamentary inheritance of property among these people.

In seeking a solution of the problems involved in this subject we are at once transported back to the very origin of the notion of rights in property, which is contemporary with, practically speaking, the dawn of human intelligence. It is true that property of such primitive people probably consisted of only such rude implements of the chase, warfare, and the simplest things necessary to the subsistence of life. But as meagre as they must have been in the first instant, they furnish us a clue to the genesis of ownership "*dominium*." It is only a natural psychological

<sup>1</sup> It is not far to suppose that this was the custom among the Romans on instituting an heir.

conclusion that these implements, being as they were in the exclusive use and possession of the person appropriating the use of the article, would in time not only become associated with the possessor, but to the psychological reasoning of the primitive mind, from the very nature of their exclusive use by such person, be regarded vaguely as a necessary part of his personality.<sup>1</sup>

It is difficult to find much sympathy with such writers as Hunter, who says: "Conclusive evidence has been brought forward to show that when ownership is first recognized, it is not ownership by individuals, but ownership by groups—the family, the village or commune, the tribe or clan. Individual property arose from the breaking up of such groups and the distribution of the rights of the whole among the members." This assumption of "Conclusive evidence" of such writers on Roman law is undoubtedly their grounds for giving intestate succession historical precedence over testamentary succession. They may have been influenced to this position possibly by the fact that, at the time we get our first authentic historical account, we find a complete system of intestate succession developed. Yet, side by side, we find an unqualified right of the *paterfamilias* to dispose of, as he may see fit, the entire property under his control; and this latter system taking universal precedence over the former. While there may be some grounds for their position in other primitive communities, it would seem that the peculiar construction of the Roman family, and the rights of the *paterfamilias* to dispose of all the property, points to an unassailable conclusion that the idea of ownership arose from individual possession, at least among the Romans. I hope likewise to show from historical instances among tribes of primitive people, not unlike the Romans in ideas of government and religion, that our position is reinforced,

<sup>1</sup> Analogous origin of totem and other fetish worship.

especially with reference to the idea of associating the possession of property as being a part and parcel of the individuality of the possessor.

It is by no means an uncommon practice among tribes of primitive peoples, especially those given to ancestor worship, to bury with the deceased all the property he possessed. The writer has personally witnessed such funeral rites among the Chinese and Australian aborigines.

Many instances of burying the property of the deceased with him, probably as a part of his personality<sup>1</sup> and for his use in a future life, are recorded in all periods of history, and has even reached our own civilisation in symbolic form. One can scarcely go through Westminster Abbey, not to mention the tombs of Egypt and numerous other places, without being impressed with this early custom.

Illustrative of this oneness of the possessor and his possessions, let us quote an interesting account in *Africana*, by Duff Macdonald, of a native funeral in Central Africa.<sup>2</sup> Along with the deceased is buried his property, including his bed, the pot that held the drinking water, and his drinking cup; and "If the deceased owned several slaves, an enormous hole was dug for a grave. The slaves are now brought forward. They may be either cast into the pit alive, or the undertakers may cut their throats. The body of their master or mistress is then laid down to rest above theirs and the grave is covered in." The same writer further says: "The practice of sending messengers to the world beyond the grave is found on the west coast. A chief summons a slave, delivers him a message, and then cuts off his head. If the chief forgot anything that he

<sup>1</sup> Distinguished from the later customs of burying broken articles and substitutes—*i.e.*, as was thought, the spirits of the articles for use of their owner's spirit.

<sup>2</sup> For similar examples see also Lt.-Col. Bournais et A. Paulus, *Le Culte des Morts*, Annales du Musée Guimet, V, VI, p. 102.

wanted to say, he sends another slave as a postscript." Of course this "practice of sending messengers" has no direct bearing on our subject, but is quoted here to illustrate to what extent the reasoning of the primitive mind will go in the cult of ancestor worship. But the other case of burying the goods and slaves of the deceased along with him directly confirms our theory of the psychological inseparability in the primitive mind of the human body and its earthly possessions; and the incident before mentioned, of the new chief distributing the goods of the deceased at his grave, marks the first step in the succession of an heir as he undoubtedly existed in the familiar Roman family.

This custom of burying all the goods of the deceased would, of course, in process of time, tempered by natural feelings and affections, in the lifetime of the deceased for his family, undergo modifications. It is probable to suppose that his natural affection for those with whom he had lived would awaken in him a feeling of unselfishness, and prompt him to give to some of those about him certain articles for which they had acquired a fondness and for which he might not think he had use in the next life, and thus mark the first step in a gift in anticipation of death—" *donatio mortis causa*." By a process of extension, together with gradual diminution of the idea of inseparability of the body and its possessions, and the institution of a successor heretofore considered, have we not the essence of a nuncupatory testament?

Thus far we have established, or attempted to establish, the institution of a religious successor endowed with a certain divinity of the deceased ancestor, and the unbroken individual ownership of personal possessions from their acquisition to their burial with him. We have seen that such ownership might be alienated by him during his lifetime. The religious necessity of having the family *sacra*

maintained would necessitate, in the first instant, the endowment of the successor for this purpose. Here, then, we have the prime necessity for giving before death, to take effect at death, the property of the paterfamilias and high priest of the Roman family, appointing the religious and civil successor, in the shape of a nuncupatory testament—the first form of succession among the Roman people.<sup>1</sup>

The profound reverence for the spirits of the dead would practically insure that the wishes of the deceased would be carried out to the letter by the successor; besides, was not the successor regarded as in a sense taking on the divinity of the deceased, and in fact the deceased himself? Hence, from the very nature of things, the deceased's wishes would be religiously fulfilled. Under such a system and with all the resources of Roman ingenuity, it was not likely that there would often occur a vacancy in the succession, but as the cult grew more obscured through multiplication of divinities, and the probable introduction of foreign influence, as the people grew more lax in their religious obligations, it might occur that there was no provision made by testament for a successor. In such a calamity natural equality of the household, tempered by the custom of selecting a successor from among the male descendants, and the manner of bequeathing legacies, would dictate an equitable division of the property, and thus lay the foundation for the later system of the law of intestate, and last form of succession. Though Sohen says (p. 524) "In the earliest times there was only intestate succession," and that "In course of time the idea of private ownership was destined to prevail over the traditional conception of family ownership." In view of the arguments heretofore presented, it would seem that the latter statement would be true only

<sup>1</sup> The order of historical sequence of the codicil should, in the natural order of things, follow close upon the heels of the earliest testaments.

in case it were just reversed, while as to the former statement it is not only opposed to what we have attempted to show to be facts, but (p. 523) he seems, in view of our reasoning, to contradict himself when he says, "The fundamental idea which lies at the root of both proprietary rights and of proprietary liabilities, or obligations, is the idea of immortality," and is thoroughly in accord, when viewed in its primitive religious signification, with our own position—therefore we make the witness our own. We see the tenacity of the old Roman religious disposition throughout the whole subject, for "From the legal standpoint," says Hunter (p. 149), "the nomination of the executor was the whole object of the will."

In giving a cursory glance at the subject of succession as it appears in other advanced countries still practising ancestor worship, we can scarcely help being struck with the fact that, in such countries, the laws have been developed along the lines of, and in many cases almost identical with, those of ancient Rome. While this is more or less the case in many countries, including ancient Mexico and Peru, it is especially striking in China<sup>1</sup> and Japan<sup>2</sup>. With regard to the latter, we get a very remarkable parallel in an interesting little book by Nobushige Hozumi, and we cannot improve on a few quotations from this book.<sup>3</sup> He tells us that "It was only after the restoration of 1868 that the house system began to lose its force and that the individual and not the household began to form the unit of State" (p. 481). "Although the house has thus lost its corporate existence in the eyes of the law, it still, nevertheless, maintains its character as the unit of society.

<sup>1</sup> Th. Collier, *Les origines du droit de propriété et la Chine*, *Revue Sociale Catholique*, V, 9, p. 42.

<sup>2</sup> Th. Collier, *Les origines du droit de propriété et la Japon*, *Revue Sociale Catholique*, V, 8, p. 225.

<sup>3</sup> Nobushige Hozumi, *Ancestor Worship and Japanese Law*.

<sup>4</sup> Ch. Letourneau, *Property—its origin, &c.*, pp. 72—166.



The house is the seat of ancestor worship—those who establish new houses have no house ancestor to worship<sup>1</sup> and therefore are at liberty, if so disposed to establish such houses, and to become members of other houses by adoption, marriage, or any other arrangement. But with those who have succeeded<sup>2</sup> to the house headship the case is different” (p. 46). The Civil Code of 1898<sup>3</sup> “allows members to secede from a household and establish a new ‘branch house’ with the consent of the head of the family. A legal presumptive heir is ‘*heres necessarius*’ and to him falls the duty of succeeding to the headship of his house and of upholding the continuity of its worship. For this reason, he or she cannot become a member of any other house by marriage, adoption or any other cause, nor found a house of his or her own, except where the more important duty of preserving the continuity of the worship of the main branch of the house renders such a step necessary. Sometimes hardships arise from the operation of this rule. For instance, a male head of a household or a male legal presumptive heir of a house cannot marry the only daughter of the head of another house, owing to the fact that she is the legal presumptive heiress to the headship of the latter house. In such cases the only alternative is to disinherit the heiress according to provisions of the code which requires the judgment of a Court<sup>4</sup> of law (Art. 975), and thus enabling her to enter another house by marriage” (p. 47). Moreover, “it was the duty of every head of a house to marry for the purpose of avoiding the calamity of the family *sacra* becoming extinct” (p. 49); and “it is the established principle of our customary law, which is maintained with some modification in the new Civil Code (Art. 750), that

<sup>1</sup> Analogous to an “*Emanipatus*” in the Roman law.

<sup>2</sup> *I. e.*, succeeded to the place of an ancestor.

<sup>3</sup> Civil Code, Art. 743.

<sup>4</sup> Like arrogation in Roman law, and like the early Roman law, the early Japanese law probably required the consent of the pontiffs.

a member of a house must obtain the consent of the head of the family for his or her marriage. The house-law 'Koy-riyo' of the Taiho Code also required the consent of grand-parents" (p. 49). "As marriage was regarded as the means of obtaining a successor to the *sacra* of the house, the head of the house must guard against any improper alliance" (p. 51).

The same writer further tells us that "In ancient times the duty of performing and continuing the worship rested on the head of the house, and the property of the house exclusively belonged to him. He owned his property because it was left by the ancestor, and the authority and property of a house-head rested on the ownership of ancestors. *In those times continuation of house worship formed the sole object of inheritance.* But in the course of time the authority of the house-head, which at first comprehended both power over the members of the house and rights over house property, came to be considered by itself in law. Afterwards the two constituent elements of the authority of the house-head gradually began to be separately considered, until at last, property came to be regarded as a distinct object of inheritance" (p. 69). "The new Civil Code recognises two kinds of Succession; succession to house headship or '*Katoku Sozoku*,' and succession to property or '*Isau Sozoku*.' But there are many rules still remaining, which show, that the foundation of the succession to the house headship is the necessity of continuing the worship of ancestors: 'The ownership of the records of the genealogy of the house, the articles used in house-worship and the family tombs, constitute the special right of succession to the headship of a house' (Art. 987)," (p. 70). "Originally the nearest in blood to the ancestors worshipped and their male descendants were preferred, because they were considered to be the fittest persons to offer sacrifices to the spirits of descendants" (p. 71). It would seem that these "legal

heirs," like the *heredes necessari* in the early Roman law, were not permitted to refuse the succession.

In considering the above facts with reference to Japanese laws, *their similarity of apparent origin and development to those of the early Romans*, it is at once patent that their common progenitor:—ancestor worship—maintained its supremacy for ages, and its tremendous influence in the Japanese system continues to the present day, and only lost its power in the Roman system through foreign influences and the final triumph of Christianity. To conclude: It may seem that an undue prominence has been given to the consideration of modern illustrations of ancestor worshipers, but it is sometimes advisable to conduct an investigation from known to unknown conditions, even though the unknown conditions come first in the order of logical development and historical sequence. From our observation it has appeared that nearly all races of people practising the religion of ancestor worship, in its primitive form, developed practically the same customs for the regulation of the family and community. Consequently, we cannot unqualifiedly accept the statement made by so many writers that the Roman family is unique, and that nothing approaches it in likeness among any other people. Nor can we unqualifiedly accept their assurance that intestate succession in the Roman law is primordial and not derivative, but on the contrary, so far as our investigations have carried us, we are forced to the opposite conclusion, for we have seen that, in every stage of development of ancestor worshipers in every country, ancient and modern, the prime essential was, and is, the appointment of a successor and his endowment by the religious and civil head of the household, with *his* property as a natural fund, to provide the expenses necessary for the observance of appropriate religious ceremonies after his decease; that the authority of the head of the house over, not only the

members of his family, but over the house property as well, was in early times unqualified and supreme; and that, while not dogmatically asserting our thesis, from our necessarily limited investigation, not recapitulating further, we have deduced reasonable evidence on which to base a conclusion that this supreme authority in the head of the household to dispose of his property was exercised by him, from the earliest times down to a comparatively late stage of development in the form of a nuncupatory will: the earliest kind of a succession in Roman law; and that all other methods of disposition of property are derivatives of the same.

C. M. BRUNE.

#### V.—TEACHING BY MOOTS.

[S it not a fact that we in England have, during the last few centuries, allowed a practice to die out which in former times was followed with the greatest possible advantage to the public, and which, whilst lost to us, is still in active operation throughout the United States?

In the medieval educational system, the method of teaching by disputation was the most important. It is known to-day as the Socratic system, and had perhaps been more fully developed in connection with legal education than elsewhere, although to some extent it is still practised in the medical and scientific schools.

It is the object of this article to shew that this ancient method of teaching, which if not invented by, certainly took firm root in, the Inns of Court and Chancery, might with untold advantage be re-introduced into our scheme of legal education, and that it would prove little more than a revival in slightly altered form, to meet modern requirements, of our own medieval practice. The outstanding feature of this system was its eminently practical nature. It produced men capable of transacting business thoroughly and efficiently.

To make the situation clear it will be necessary to examine legal education as it obtained up to the reign of James I, and it is the more necessary to do so lest it should be urged that some new-fangled order of things utterly alien to modern ideas and requirements is being advocated. Upon examination it will be found that both the English and American systems were based upon the same idea, *viz.*, that of teaching men to understand the principles of the Common law and to apply those principles in practice.

Lawyers for many centuries received all or most of their professional education in one or another of the four Inns of Court. Each of these Inns in former times was accustomed to appoint an officer called the Reader, upon whom, during his term of office, devolved the chief responsibility of conducting the education at his Inn, and by whom the degree of Barrister-at-law, or Apprentice-at-law, as it was first called, was ultimately conferred. This office of Reader was obligatory, and physical infirmity alone was tolerated as an excuse for non-acceptance. Originally, Readers were appointed in the order of their seniority at the Bar, but as the standard of proficiency became lowered during the 16th century only those of proved reputation for learning and practice were selected.

A remarkable custom in connection with these appointments must be mentioned here; remarkable for two reasons, first, because it unmistakeably connects the Serjeants<sup>1</sup> with the Old Law Schools in the City; secondly, because it shews the determination of those responsible for the management of the affairs of the Inn to obtain the most eminent men in the profession as Teachers. "According to ancient laudable use and custom from a time whereof the memory of man runneth not," when a member of the house received his Writ as

<sup>1</sup> Serjeants were a privileged class, having exclusive audience in the Court of Common Pleas, and from them alone the Common law Judges were selected.

Serjeant, he was immediately appointed to read at the next learning vacation in the place of any member already selected, even if he himself was a double Reader.<sup>1</sup> The usual result of this rule, which was strictly observed during the continuance of the system, was to create treble Readers, since Serjeants-elect had in early times at any rate usually read twice. Thus the tradition survived that a serjeant, if he were available, was the proper person to read and to call candidates to the Bar.

It is obvious from the position which the Reader occupied in his profession, that he could not attend to his duties as a Teacher during Term time : therefore, it was customary for each Reader—there were two in each year—to hold his Reading (which lasted for three weeks and three days) in Vacation time.

From a Report presented to Henry VIII in 1540, and from other sources, we are enabled to present a tolerably complete picture of the curriculum of a Law Student of that day. The year was divided into periods known as Two Learning Vacations, Four Terms, and Six Mean Vacations. The learning Vacation was wholly devoted to legal instruction. The principal function thrice a week was the Reader's Lecture, commencing at 8 o'clock in the morning and lasting some two hours or more. These lectures were attended by all the Members of the Inn, and were of such learning and authority as often to form the basis for some learned treatise. Thus Lyttleton's Reading on the Statute *De Donis Conditionalibus* became the basis for his famous work on "Tenures." Coke read on the Statute of Uses, as also did his rival Sir Francis Bacon, whilst Treherne read on the Forest Laws ; Gallis on Sewers, and Jardine on the Use of Torture.

After opening the subject of his address, the Reader then proceeded to explain the objects of the Statute selected by

<sup>1</sup> *Inner Temple Records*, Vol. I, 413 (1520).

him for discussion, and to point out the mischiefs which the Statute was designed to check, and the remedies by which such mischiefs might be prevented or punished. He next propounded what he conceived to be the doubtful questions arising upon the construction of the Statute, and submitted his own opinion for their solution, *putting these in the form of questions or cases*. The Junior Barrister present then selected one of the many questions raised by the Reader and endeavoured to refute the Reader's opinion. This barrister was followed by each of the other barristers and any benchers who might happen to be present, in the order of their seniority, and then the Reader replied, endeavouring to refute the objections raised and to confirm his own opinion: if any Judges or Serjeants were present they followed with their opinion. Another question was selected by the next Junior Barrister and the same procedure was repeated. This concluded the Reading for the day. In these discussions the younger students were present, but took no part.

How the students occupied their time between the close of the Reading and dinner at 12 o'clock does not appear, possibly the more industrious entered the chief points of the arguments in their common-place books. With the Barrister it was otherwise. At the Inner Temple, upon the conclusion of the lecture, the Reader handed his paper of cases for that morning to the puisne Barrister present. "All the Barristers then collected to break the case and open the case to the said puisne Barrister," who after dinner argued the case at the Bench Table and was followed by every Bencher present, the Reader summing up and declaring his own opinion. At some of the Inns these exercises were known as "Bolts."

Now we come to "the Moot," which was second only in importance to the Reading. Every night after supper the Reader with one Bencher at least came into Hall and

stood at the Cupboard,<sup>1</sup> one of the barristers present propounding some arguable point of law which had occurred to him worthy of discussion, whereupon each Benchers in turn argued it and the mover replied. This was for the purpose of obtaining an arguable case. A Court was then formed at the end of the Hall, the Reader and Benchers sitting at the Bench Table. Facing them on a form in the middle of the Hall sat at either end a barrister and two students between them, who represented the leading and junior counsel for an imaginary Plaintiff and Defendant in the trial of a cause which had arisen out of the cupboard discussion. The student for the Plaintiff opened the pleadings in law French, to which the student for the Defendant pleaded in the same tongue. The barristers above referred to then argued (likewise in French) such points as in their opinion were arguable within the case. This ended, each Benchers in turn declared in English his opinion upon the whole matter. The whole proceedings were conducted exactly as in the trial of an action in the King's Court. Originally a bar was placed across the Hall below the Bench Table, but this had apparently disappeared by the time of the Report to Henry VIII. Utter Barristers were so called, said Henry's Commissioners, because when they argued the moots "they sat uttermost on the forms which they call the Bar, and this degree is the chiefest degree for learners in the House next the Benchers."

During lent time the students and such barristers as were not yet allowed to practise, attended the Courts at Westminster to listen to the trial of causes, a place known as "le Cribbe" being reserved for their use, in some of the Courts, and after dinner, also during term time, "bolts"

<sup>1</sup> The cupboard contained the plate of the Inn and the space between it and the Bench Table was regarded as sacro-sanct. The barristers who argued as above were consequently known as "Cupboard men."



were performed, and after supper "moots" took place as in the Learning Vacations.

It was these occupants of "le Cribbe"—not being fully qualified barristers—who probably produced the early Year Books. These reports were thus not official, but rather in the nature of a lawyer's common-place book, the main purpose of which was to place on record for future use points of pleading.

Oral pleading was methodically formed and cultivated as a science in the reign of Edward I, and lasted till nearly the end of Edward III's reign, when written pleadings came into use. The object of oral pleading was to ascertain, by argument in open Court, the questions involved in the facts of the case which would have to be decided at the trial. These students were not reporting for the daily press nor even for authorised Law Reports, they were reporting for their own benefit as future practitioners. "What they desired," says Professor Maitland, "was not a copy of the chilly record, cut and dried, with its concrete particulars concealing the point of law: the record overladen with the uninteresting names of litigants, and oblivious of the interesting names of sages, of justices, and serjeants. What they desired was the debate with the life-blood in it, the twists and turns of advocacy, the quip courteous, and the counter-check quarrelsome. They wanted to remember what really fell from Bereford, C.J., his proverbs, his sarcasms, how he emphasised a rule of law by "*Noun Dieu*" or "*Par Saint Pierre*." They wanted to remember how a clever move of Serjeant Heile drove Serjeant Toudebey into an awkward corner, or how Serjeant Passeley invented a new variation on an old defence.<sup>1</sup> The occupants of le Cribbe were treated with tender consideration by the Court. When the same learned judge was one day laying down the law, Serjeant Westcote interfered.

<sup>1</sup> *Year-Books of Edward II*, Vol. I, 15. (Sel. Soc.)

"Really," said Bereford, C.J., "I am much obliged to you for your challenge; not for the sake of us who sit on the Bench, but for the sake of the young men who are here." On another occasion he gave a little lecture on some knotty point expressly for the benefit of these young men—"les jeones qui sont environ." It will readily be perceived how invaluable such attendance in the Courts was to the Law Student who was there learning the principles of law and pleading at first-hand.

Even in the Mean Vacations exercises of learning were not wholly neglected. Bolt cases were argued after dinner and Moots held after supper, with the same formalities as in the Learning Vacation, but with this important difference however: the latter were brought in and pleaded by the students, barristers taking the place occupied by benchers in the Learning Vacation and Term time. At the Middle Temple the Reader elect was expected to remain in the Inn during the Mean Vacation and to preside at the Moots.

The two causes commonly assigned to the decay of this system of teaching were (1) the enormous expense entailed upon the Readers through the entertainment they were expected to provide, and (2) the loss of time imposed upon busy practitioners. It practically ceased to exist in the time of James I.

The Moot which survived the Readings disappeared chiefly because the students were discouraged, in consequence of the absence of the senior members of the profession. Another proof of the severely practical character of the system is afforded by the long apprenticeship to study the law demanded during the period under review. Before he was admitted to practice as a Pleader in the Courts at Westminster, a student for the Bar had to pass one or two years at an Inn of Chancery and to obtain a certificate from the Reader in Chancery testifying to the

due observance of the exercises of learning there obtaining. He had then to wait seven or eight years before he could be called to the degree of a barrister, and even when called he had to serve a further probationary period of three years or twelve years in all before he was a *fully qualified counsel*, and during the whole of this time he was required to perform all the exercises of learning prescribed by the rules and customs of his own particular Inn of Court.

Mr. Lewis, who was appointed lecturer at Gray's Inn in 1847, was the first to revive the obligation of Mooting in Hall. With the formation of the Council of Legal Education in 1852 this practice was however abandoned, but it was revived by the students themselves in 1875, under the name of the "Gray's Inn Moot Society," which is still in existence after a most successful and stimulating life. A Moot Court is held six or eight times a year, at which as a rule a well-known King's Counsel presides as moderator, This example has unfortunately not been followed at the other Inns. Sir Frederick Pollock did indeed, when lecturer to the Council of Legal Education in the eighties, conclude each course of lectures with a Moot; but here again it was only the picked men who enjoyed the privilege of taking part.

A forcible appeal for the revival of compulsory Mooting has been made by Mr. Cecil Walsh, one time secretary of the Gray's Inn Moot Society. "In the old days," he writes, "the learned Readers of the profession were proud to gather about them bands of young men who, anxious to pick up some crumbs from the Master's table, thronged round them in their leisure moments in Westminster Hall and keenly debated knotty points. Moots had been their introduction, upon this common ground of formal argument in Hall, Barrister and utter Barrister, Reader and Ancient, met for common good of all: the one to argue and learn, the other to argue and teach. A noble idea, but too

picturesque for the 19th century." Yet something like it adapted to the altered habits and customs of modern life might well grow out of a revival of Mooting to the great gain of the profession.

The great chief justice, Lord Russell of Killowen, in an address to the Members of the Moot Society in 1899 said: "I want to know why, if this system of Moots was found to be a necessary part of legal training in the past, and why, if we are of that opinion now, it should not be a necessary part of the legal system in our days? Why should it be left to the voluntary efforts of young men"? No satisfactory reply has been forthcoming.

In the reform of legal education in the United States, the law school of Harvard University has been the pioneer. This school, then, is not merely a place where a degree in law of high standing may be obtained; this is not the Student's primary object, he desires above everything to qualify himself for the practice of the law. He is usually already a graduate of Harvard or some other University, and may be compared to the Inns of Court man or the articled clerk who is attending class at the Law Society.

To obtain the law degree, indeed, the American student must go through a carefully prepared three-years' course, attending at least fifteen sets of lectures. But a high degree, even an honour degree, by itself is of no more practical value in the States than in England. Accordingly the American student, in addition to obtaining a good degree, seeks to make a reputation at the University for extensive and accurate knowledge of law and for dexterity in legal argument. A student, says Professor Dicey, who has gained such reputation is certain of making a start in his profession from the first. A correspondent from Harvard wrote to him as follows:—"Our young honor graduates are recognized as desirable men because of their ability to deal with legal problems, and as a rule secure

positions in offices where they receive a small salary from the first. I receive letters every year from Lawyers in Boston, New York, Chicago and other cities, asking me for the names of some men about to graduate *cum laude* whom I can recommend for a position in their offices."<sup>1</sup>

In the United States, as upon the Continent of Europe, scientific teaching in law came to be regarded as a necessary preliminary to professional practice. It was Professor Langdell, the founder of the modern system at Harvard, who established two propositions: first, that law is a science: secondly, that all the available materials of that science are to be found in the Law Reports. The problem to be solved was to discover the method by which the scientific teaching of law might become, in the best sense of the word, practical.

What, then, are the methods by which this object is to be attained? It is attained by three principal Institutions, the professorial lecture, the Moot Court, and the Law Club. The Lecturer may be compared somewhat closely with the Reader. He employs the Socratic method. On joining the class the student has placed in his hand what is known as a Case Book. He is expected to be prepared to shew some knowledge of a dozen or more cases at each lecture. He may read, if he likes, some text-book bearing on the same subject. At the lecture the students number from 100 to 200, and the professor has a list of names in front of him. He calls upon now one and now another to state the result of one of the cases. He asks questions about it, he raises every point: he suggests, in the way of questions, variations on the case: he states, in the form of observation, its real gist.

"On his part the student is required to analyse each case, to discriminate between the relevant and the irrelevant, between the actual and possible grounds of decision, and

<sup>1</sup> *Contemporary Review*, November, 1899.

having thus considered the case he is prepared and required to deal with it in its relation to other cases. In other words, the student is practically doing, under the guidance of an instructor, what he will be required to do without guidance as a lawyer in actual practice. While the student's reasoning powers are being thus constantly developed, and while he is gaining the power of analysis and synthesis, he is also gaining the other object of legal education, namely, a knowledge of what the law actually is." <sup>1</sup>

In this method we see a very close resemblance to the Reader with his bag of cases and his doubts raised on the Statutes. The merit of this method is two-fold, it compels the student to rely on his own efforts to learn, and it calls into play the disputatious spirit, and further it stimulates debate outside the lecture room.

At the Moot Court the whole law school meets, the law professor sits as a judge, whilst young men, generally third-year men, argue some difficult point of law in the manner which would be required from a barrister addressing the Supreme Court Bench.

The Law Club is not official, it is similar to the mediæval Moot, inasmuch as all the formalities and conditions appertaining to a trial in Court are observed. But it is conducted by the students themselves, and the objects of the mediæval Moot are to some extent attained by the Institution of Three Courts, one for men of each year: eight members from first-year men form the Superior Court, eight second-year men form the Supreme Court, and eight third-year men the Court of Appeal. Thus arguments are conducted before students acting as judges of superior standing and authority than the pleaders. As in the mediæval Moots, the case is carefully prepared beforehand, and submitted to the person who is to preside, for settlement. Two members are assigned to argue it, and a week before the

<sup>1</sup> Professor W. A. Weener, *Rep. of Amer. Bar Ass.*, Vol. 17, 482.

Moot they hand in a list of all the authorities they propose to cite. Thus all parties are prepared to attend in a critical spirit. After the argument each judge delivers his judgment or opinion, and the President is expected to hand in a written judgment. In these disputations, whether at the Club or the Moot, the student gains an amount of practical training which he can gain in no other way. Before he goes into Court on his first case, he has already learned readiness of address and nimbleness of mind.

A remarkable development of the Law Club is what is known as the "Law Dispensary": in other words, "a poor man's legal aid society." Such a society was established at Pennsylvania University in 1892 and appears to have enjoyed a most successful career. Once a week the students, under the presidency of a qualified barrister, meet in one of the lecture rooms, where poor people, being applicants for legal advice and assistance, attend. One by one these applicants tell their story, one of the students being assigned to each applicant in order to draw out the real points of his case by interrogatories. A general discussion then takes place, the presiding Barrister summing up and advising what action ought to be taken. Thereupon, if it is decided to take action, one or two students are assigned to take charge of the case, examine witnesses, get up the evidence, and prepare the case for trial. For the trial a graduate of the Law School is assigned to act as counsel, with the student at his elbow, acting in the capacity of solicitor in the action.

The essential conditions for a successful Law School may be summarised as follows:—

First, there must be properly qualified Teachers in every branch who must not be expected to teach more than one single subject, or at the most two or more subjects closely related. Secondly, the Teachers must give substantially

their whole time and strength to their work. "You cannot," said Professor Thayer in 1895, "have thorough and first rate training in law any more than in physical science unless you have a body of learned Teachers: and you cannot have a learned faculty of law unless like other faculties they give their lives to their work. The main secret of teaching law, as of all teaching, is what Socrates declared to be the secret of eloquence, understanding your subject: and that requires, as regards anyone of the great heads of our law in the present stage of our science, an enormous and absorbing amount of labour."

Thirdly, the students must devote their whole time. "There is more than enough in the careful preliminary study of the law," says Professor Thayer, "to occupy three full years of an able and thoroughly trained young man. . ." It is a delusion to suppose that this precious seed time can be profitably employed in attendance in the Courts or in apprenticeship in an office. The time for this comes later."

In some of the American Law Schools, it is true technical instruction is given. At Maryland University, Baltimore, instruction in drafting Deeds and Wills is provided, and in John Hopkins University in the same City law students attend the Law Courts, but this latter practice is not systematic. It is performed not for the purpose of hearing the details of procedure so much as to gain a general idea of the proceedings in an action.

With regard to the qualification of a Teacher it is the general opinion that he should have enjoyed some practice at least. For obvious reasons it is not desirable that a man in active practice should be appointed, either his pupils suffer or his Clients. The ideal Teacher is a man who has enjoyed a large practice for a considerable period



and is at the same time a jurist of repute. Professor Thayer, for instance, had had twenty years' practice at the Bar before he became a teacher. It would not be difficult to find many men in the ranks of the Bar or of the Law Society who would gladly exchange the turmoil and anxiety of practice for the professor's chair, and who are thoroughly qualified as jurists of repute.

Is it not possible that history may repeat itself and that at no distant period of time all law students, whether they intend to practice as barristers or solicitors, may again receive their professional training at one and the same School of Law—at any rate, Lord Selborne, so long ago as 1872, recognised and advocated the establishment of such a school? It is interesting to note in this connection that attorneys, although officially excluded from the Inns of Court and relegated to the Inns of Chancery in 1555, continued to be members of the former until the end of the 18th century.

The Law Society, at any rate, is alive to the importance of Legal education. In 1905, when Sir Robert Finlay's scheme for the creation of a great school of law failed, that Society at once took steps and established a school of their own, and as recently as September, 1909, the President of that Society (Mr. W. H. Winterbotham), in his Presidential address, expressed a hope that it might be found possible to establish a Practice Class, to include a Moot Court, in connection with the teaching given by the Society.

It is interesting to see how speedily the Society gave the recommendation a trial. The first Moot was held at their Hall in Chancery Lane, with the Right Honourable Arthur Cohen, K.C., presiding, on the 20th October, 1909.

With the evidence of the practical value of such a system from our own history of legal education and from that of the United States, the institution of a scientific legal education is merely a question of time. A few years hence law

students who have been trained under such a system will be in as great a demand in the profession in this country as the students of the Harvard Law School have been for some time past in their own country.

HUGH H. L. BELLOT.

## VI.—OBSCENE LITERATURE AND CONSTITUTIONAL LAW IN AMERICA.<sup>1</sup>

IN a pamphlet which is issued with this book the Author describes the work as "the most extraordinary law-book of a century." This description seems correct enough, since the ordinary law-book is a book mainly about law. This book, however, is mainly about the absurdity of "modesty" and of any law designed to prevent or restrain outrages upon it. The examples given in the book show clearly enough that the notion of what constitutes such an outrage is sometimes so extended in America as to interfere with the serious discussion of important questions; but nothing that the Author says inclines us to consider that real outrages should not be prohibited.

The book seems to be a compilation of essays which have mostly already appeared in American magazines. As it stands, the bulk of it consists of a series of rather hysterical arguments in favour of an unrestricted right to discuss sexual questions in the press, and against the power which the Postmaster in America exercises of refusing transmission through the post of what he considers obscene or otherwise objectionable matter. The latter seems to us to exercise his powers somewhat arbitrarily, but legal ways in America are

<sup>1</sup> "*Obscene Literature and Constitutional Law*, a Forensic Defence of Freedom of the Press. By Theodore Schroeder, Legal Counsellor of the Medico-Legal Society of New York, Compiler of Free Press Anthology. Privately printed for Forensic Uses: New York. 1911.

inclined to be arbitrary, which is no doubt the opinion of the unfortunate Englishman who was recently arrested for neglecting to appear for examination before the attorney of the party against whom he had gone to America to give evidence. Sometimes, however, when we look over our correspondence of a morning, and find it consists principally of touting letters from money-lenders, advertisements of patent medicines, and glorifications of scrofulous novels, we half regret that our own Postmaster does not exercise a similar jurisdiction over it.

So far as English lawyers are concerned, the only part of the Author's argument that touches them is his repeated statement, that no such thing as obscene libel was known to the ancient Common law of England. Very possibly he is right. For that matter no such thing as simple contract was known to it either. It all depends upon the time you start at. If you go far enough back you can find a period when the ancient Common law restricted its operations to the laudable but limited object of preventing the King's subjects from cutting one another's throats; and, truth to tell, it seemed to have its hands pretty full with that alone. And nearly the whole law of crime, of tort, and even of contract as they now stand, developed out of that jurisdiction. The one thing the King's Courts looked after was the King's Peace. Breaking that peace was the one thing they would not tolerate, and next to breaking it they objected to anything which was likely to lead to someone breaking it. And that was the ground on which, among others, they came in later times to declare the publication of obscene matter an offence. It was a good ground too. More than once when we found a letter on our breakfast table which, on opening, contained information which could be tendered to us only on the supposition that we were suffering from some vile disorder, if the sender had only been handy

there undoubtedly would have been a somewhat serious breach of the peace on the spot.

No doubt the law with regard to obscene libel developed rather late. That was due to two circumstances. In the first place people in earlier times were not so sensitive or "mealy-mouthed," if the Author would prefer that, as they are at present. Sir Walter Scott tells how his grandmother was ashamed in her old age to read in private, novels and plays which in her youth had been read to the family. The other circumstance was the censorship of the press. As long as that existed, a very easy mode of preventing the circulation of what was then thought obscene literature was by refusing a licence to print it. If it were printed without licence a very easy mode of punishing the publisher was to pop him in jail for unlicensed printing. It was only when the censorship lapsed that the Courts were driven into taking steps to restrain the abuse of the printing press.

When the Courts did attempt to restrain this abuse, they evidently regarded the jurisdiction as more or less a continuance of that of the censor. That is the reason that till Fox's Libel Act 1792, they restricted the function of the jury in libel cases to a finding as to publication. Mr. Schroeder says (p. 17) that that Act made the jury the judge of the law as well as the fact. It did nothing of the kind. It gave the jury the right they possessed in every other prosecution—the right of returning a general verdict. It was the judges who had trespassed upon the function of the jury by insisting on the jury accepting their decision as to whether the alleged libel was in fact defamatory, seditious, etc. Henceforth they were confined to their proper sphere—that of directing the jury as to the law and leaving the jury to apply it. If Mr. Schroeder thinks that the jury are judges of the law he had better consult Mr. Justice Ridley on the point.

The Author's arguments on the constitutional issue are possibly more interesting to Americans than to us. They consist of a strenuous contention that the American laws against obscene libels are void, as the United States' constitution reserves from the jurisdiction of Congress the freedom of the Press. The grounds on which he bases this contention are set out in the first chapter of his book, the rest of which consists largely of repetitions and amplification of them, and essays on such texts as "Obscenity, Prudery and Morals," "Ethnographic Study of Modesty and Obscenity," "Psychologic Study of Modesty and Obscenity," etc., etc.

These grounds may be stated very shortly but very sufficiently. He contends that the laws against obscene libel are unconstitutional: (1) Because no express or implied power is given to Congress to enact them; (2) Because they are contrary to the constitutional guarantee of freedom of speech and of the press; (3) Because they violate the constitutional guarantee of "due process of law"; (4) Because, in practical operation, they violate the constitutional guarantee against *ex post facto* laws; (5) Because the want of any sufficient definition of obscenity makes the jury judges of both the law and the fact.

We do not propose to examine these grounds at any length. The first seems to be answered completely by the counter contention that Congress, like the British Parliament, can enact anything it pleases, subject only to the limitations expressly set out in the constitution. The very fact that certain subjects are expressly exempted from its power to legislate, assumes that it can legislate on all subjects not exempted. *Expressio unius est exclusio alterius*. The second ground is so obviously insupportable in its full extent that Mr. Schroder feels that some limit must be put upon it. If freedom of speech and the press is incapable of limitation, then it must be perfectly legal to incite to murder.

So Mr. Schroeder limits it to a freedom, the exercise of which injures no one. Is then an incitement to murder no crime in America unless the murder comes off?

The other three grounds are practically one and the same stated from different standpoints, namely, the uncertainty of what will or will not be held to be obscene. Probably no point gives, in this country, less trouble to the Courts. But if the impossibility of exactly defining an act prevents it from being forbidden by law, how are we to forbid any kind of libel? The essence of libel is defamation, and what one man regards as defamation another may regard as flattery. For instance, we should regard it as very defamatory if it were alleged that we had published an obscene book. Would Mr. Schroeder take the same view?

A great many things are forbidden by law which cannot be exactly defined by law—fraud, for instance. A great many things are forbidden by law where it is a matter of opinion in each case whether or not they will cause injury—seditious speech, for instance. In all these cases the question of fact, whether the thing forbidden has actually been done, and whether the injury aimed at will or will not follow, must be left to the common sense of judge and jury. Their test in the second case is not whether the act might induce some morbidly minded person to do wrong, as the Author suggests, but whether it might not so induce the average person whom it is likely to reach. The very test cited by Mr. Schroeder (p. 55) from the English case of *Reg. v. Hicklin* (L. R., 3 Q. B. 360), shows this: "Whether the tendency of matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort is likely to come." What may be published lawfully where the price and mode of circulation are likely to confine the matter to professional readers, it may be very wicked to publish so as to bring it into

the hands of boys and girls. Whatever has been done in America, and our Author shows the law against obscenity has been carried there to extreme lengths, in this country that principle has been closely followed, with the result that free discussion has never been prevented between those able to discuss, while the minds of the young and impressionable have been on the whole fairly protected.

In conclusion we may suggest that if the Constitution of the United States does not permit Congress to forbid the publication of indecent literature, the sooner it is altered the better for the morals of that country.

J. ANDREW STRAHAN.

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## VII.—CURRENT NOTES ON INTERNATIONAL LAW.

### Patents worked abroad.

THE wide and loose language of section 27 of the Patents and Designs Act 1907 will give rise to some judicial conundrums before its interpretation is finally settled. It will be remembered that it empowers the Controller, subject to a final appeal to a single judge, to revoke a patent on the sole ground that the patented article or process is manufactured or carried on exclusively or mainly outside the United Kingdom. In *Hatschek's Patents* ([1909], 2 Ch. 68), the question was exhaustively considered what reasons might justify the Court in holding that the jurisdiction ought not to be exercised. In the present case, *In re Green's Application* ([1911], 1 Ch. 754), the question was discussed as to when it arose. Could a process be said to be "carried on," if as a matter of fact the works were closed at the moment when the petition was presented? Parker, J., thought

that probably it could, if the works were merely closed for the day (as on Saturday afternoon): and he seemed to think that it could, even in the case of a more extended stoppage, if that were temporary only—due, for example, to over-production or other business exigencies. But he declined to consider that the manufacture could be considered to be in progress, when the works had stopped and the patent was in the hands of a liquidator. Since the petition for revocation cannot be presented for four years, curious possibilities are suggested by the decision, which nevertheless is clearly warranted by the terms of the section.

### Penal Judgments.

The Supreme Court has set its seal to the doctrine of Sir Francis Piggott, that a French judgment in favour of a *partie civile* to a penal case, "would seem to be a civil judgment recognisable in England in the usual way" (*Foreign Judgments*, 3rd Ed., Pt. II., p. 90). The plaintiff, a French officer, was ridden down, and seriously injured, by an American lady who was riding recklessly in the Bois de Boulogne. In the police-court proceedings which ensued, he intervened as a claimant for damages, which he obtained to the extent of 5,000 francs; and the Appeal Court increased them to 15,000 francs. Steps were then taken to enforce the recovery of these damages in England. The obstacle was the established rule of Private International law that no nation will enforce the penal law of another. These damages looked not unlike a fine to be applied for the benefit of the party injured. However, Hamilton, J., saw his way to severing the decree, and treating the portion of it which sounded in damages as tantamount to a civil judgment. One cogent argument in favour of this course was the admitted fact that the two portions of the decree were separately executed:



the penal branch being enforced by the public authorities, and the recovery of the damages being left to the party injured. This argument would also apply to such proceedings as an English police-court award of £10 damages in lieu of or in addition to conviction, in trivial cases. We presume it would apply also to the Roman delicts—although damages there were clearly penal and vindictive in most instances, and that for reasons of public interest.

### Extradition.

It is a very vexed question what is the precise relation of Extradition Treaties and the Extradition Act. Does the Act only authorise extradition when all the requirements of the treaty have been fulfilled—or are the requirements of the treaty, matters which might indeed justify the British executive authorities in declining to proceed with cases in which they have not been complied with, but which do not concern the Courts?

In *R. v. Gov. of Brixton Prison* ([1911], 2 K. B. 82), the latter view was taken. The accused, one Thompson, was alleged to have obtained goods by false pretences in a Brussels-Paris train. Depositions were sworn before a Brussels magistrate, and upon them, a French magistrate issued an order of arrest. Now the Anglo-French Treaty of 1876 (Art. 7) requires that the French requisition for extradition shall be supported by the warrant of a French magistrate, and the authenticated depositions sworn before him.

These latter could not be transmitted, for they did not exist. On a writ of *habeas corpus* being applied for, the Court held that the English judicial authorities were not concerned to see that the provisions of the treaty had been complied with. They relied on an *obiter dictum* of Lord Blackburn's, which by universal admission required some considerable qualification. The case of *R. v. Wilson* they

distinguished, by the subtle argument that in that case the Court released a person to whom the treaty did not apply at all. It was, in that process, an Anglo-Swiss treaty, excluding the surrender of a State's own subjects. We should have thought that if a Secretary of State can waive the requirement that a person shall be formally accused on oath before the judge who orders his arrest, he can waive the requirement that he shall not be of a particular nationality. In our view, the Act only applies to cases which can be brought within the four corners of the treaty. The distinction set up by Ridley, Darling and Channell, JJ., is unfortunate, and calculated to lead to difficulties in application. Could a Minister waive the exception which exempts political offenders from extradition? Clearly not.

According to Piggott (*Extradition*, p. 105), Lord Blackburn's *obiter dictum* does not at all mean that a magistrate can proceed with a case although the terms of the treaty have not been complied with. It only means that, so far as the English hearing is concerned, the magistrate is entirely independent of the Secretary of State.

### **Status, Contract and Property.**

The problems created in the field of Private International law by the growing inter-communication of nations are gradually throwing into relief a crucial question. That is the delimitation of the spheres of Contract, Status and Property. A concrete illustration is a sale of property by a minor. Here we have three elements concerned—the sale, the minority, the goods. Roughly, we may say that one law governs the contract, another the modifications which the status of minority imports into it, and a third its effect on the property. But it is obvious that these categories are so closely connected that they are apt to shade into one another in practice. Thus the practising

jurist slides into the application of one law to the real sphere of another. He finds a person of twenty making a contract, let us say, and he applies to the discussion of his powers as a minor the law which governs the discussion of the nature and effects of the contract. We take this as a simple illustration, though as a matter of fact the status of minority is so marked and sharply defined that this particular error is never made in practice. But take the case of married consorts. Here the discussion of their powers to contract is constantly confused with the discussion of the effects of their contracts, and (which is a different thing) with the discussion of the effects of their contracts upon property.

Mixed up with the whole discussion there is almost invariably found the assumption which Westlake has shown to be irrational, that the intention of the parties can be made use of as a sword to cut any and whatever Gordian knot. It is precisely to deny the intention of the parties full validity that the law of status is introduced, and the law of property maintained as a thing independent of contract. Yet to such an extent was this Laurentian theory of autonomy pressed by Kekewich, J., in the *Café Royal Case* (*De Nicol v. Curler*, (II) [1900], 2 Ch. 410) that an ancient agreement was held to over-ride subsequent changes of status, even in determining the destination of land in a country foreign to the parties at the time of their agreement. In effect, power was given to individuals to vary, and perpetuate as varied, their status, and to foist this artificial status into a foreign land-law.

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The two subjects of contract and property are kept in sharp contrast in *Bank of Africa v. Cohen* (L. R. [1909], 2 Ch. 129; *L. M. & R.*, Nov., 1909, p. 97). The Court carefully distinguishes the two, though it held that the person under disability may not only be able to repudiate

the effect of her transactions on landed property, but may also decline to be bound by them as contracts. Her capacity, that is, will be judged alike, whether it is a capacity to contract for the conveyance of, and a capacity to convey, immovables.

Convenient as such a decision is, it only applies to a contract for the creation of interests in immovables. In the case of a contract respecting movable property, it may well be that the capacity to convey may be measured by the *lex loci* of the property, the capacity to contract by that of the domicile of the party. But even this is not the last word on the subject. The personal law of the party and the law properly governing the contract may be different. Here arises a temptation which is found irresistible by Courts accustomed, as in England, to apply a contract-law which concedes the widest possible freedom of contract. It is the temptation to cut the knot, to dis-embarrass the discussion of all attempts to ascertain a proper law either of status or of contract, and to refer everything to the "intention of the parties," real or supposed. But suppose the temptation to be resisted. The distinction is still seldom adequately and clearly drawn between the powers of the party (*i.e.*, his status, governed possibly by his personal law) and the contract of the party.

In *Mackenzie v. Edwardes-Moss* ([1911], 1 Ch. 578), there was a total failure to grasp the distinction. A settlement was made by a domiciled English lady on her marriage with a domiciled Scotsman. As usual, it included an agreement to settle after-acquired property. Immediately upon marriage, the settlor became a domiciled Scot, and she remained such until the time of her decease. On that event, her widower and her only child claimed, under the law of Scotland, certain rights in her property; notably in her savings from the income of legacies of considerable

amount, a life interest in which had accrued to her since the date of the marriage. We really cannot see any answer to this claim. Conceding that her property was subject to the settlement, it was, nevertheless, only her own, subject to the rights of other persons in it, by the law governing her movable estate, *i.e.*, the law of her domicile. It was only what she could dispose of, that was within her disposition embodied in the settlement. And if it is answered that the widower had contractually waived his rights by executing the settlement—(which is by no means obviously a good answer)—that cannot possibly affect the rights of the issue. It is important to remember that this is not a question of status at all: it is a question of property. The fact that the law of the status and the law of the goods were the same, is an accident, though a common accident. The maxim regarding property, *mobilia sequuntur personam*, is not invariable. The local situation of the goods is at least as prominent in this connection. (*Castrique v. Imrie*: *Cammell v. Sewell*.) If the property had been locally situated in France, and the matter were a mere commercial affair, it is probable that a third law would have had to be considered, namely, the French Codes. And this is perhaps the best ground on which the decision can be put. The funds, being in the hands of English trustees, were locally situated in England, if anywhere: thus the property in them may conceivably be determined, as in commercial matters, by English law alone—and that takes no account of *legitim*. Consequently the whole legacy to the wife is brought into settlement. It can hardly be right, however, to treat a disposition of property so wide and extensive as is an antenuptial settlement, as governed by the same rules as are very properly applicable to isolated commercial transactions. In any case, therefore, the decision appears wrong. And it was certainly not put by the judge upon the ground of the local situation of the property—but upon that of

the supposed intention of the party, manifested by the contemporaneous execution of a second settlement in the Scottish form.

It appears, then, that a person can abstract her property from the operation of the law of her matrimonial domicile by expressing a not too clear ante-matrimonial intention of her desire. This carries remarkable consequences. Is the intending wife at all restricted in her vagrant fancy? Can she elect for the law of any civilised State? or is she restricted to choosing the law of the ante-nuptial domicile? And, if so, why? Is there a presumption in favour of the law of England? or against the law of Scotland?

The question was presented in argument for the plaintiffs as turning on the law of status. A Scottish wife has not, owing to her status, the free disposition of her property. But obviously Mrs. Mackenzie was not a Scottish consort when, ante-nuptially, she purported to dispose of her present and future property. In our view, it was not a question of status at all; it was a mere question of property. Was the legacy and its income, when it became receivable, hers, or hers subject to the rights conferred on her family by the law of her domicile? It is very apparent however that since status is principally measured by its effects upon dealings with property, the law of status and the law of property are subject to a dangerous tendency to confusion. It might, perhaps, indeed be said that there is a mistake in the view here put forward, and that it would tend to eliminate the idea of status altogether. Since status is, in the main, a complex of restrictions on dealings with property, is it not possible to represent every question of status as a question of property? Might it not be said that a minor's property is not "his"—but "his, subject to the rights of his intestate heirs"? It would be an unfounded criticism. For the inchoate rights of a minor's expectant heirs are given them,

not as against the minor, but in default of any better disposition in the very interests of the minor himself. That is quite different from the case of *legitim*, where its existence in no way modifies the *status* of the consort, but merely detracts from her proprietary rights: it is in no sense in her interest, but in that of the issue and of the public that it is introduced. Putting it differently, wherever the want of power to dispose of property flows from some reason personal to the owner—her youth, her amenability to marital pressure, or the like,—we have a case of incapacity, status, personal law. Where, on the contrary, the want of power flows from considerations not depending on the personality of the owner—for instance, where it results from the desire of the legislator to provide for other people, such as the children or the *paterfamilias*—we have a case of mere property law: the rights of the issue in a Scottish consort's movables,—the rights of a Roman *paterfamilias* in *quasi-castrense peculium*, are simple proprietary rights: they do not derive from any personal incapacity of the *de cuius*.

Whether the law of Scotland or England was properly applicable to the contract is a very small point—though the judgment makes a great deal of it—for the law of Scotland does not differ much from that of England in respect of contracts, nuptial or otherwise. Taking it either way, we find among its terms an apparent reservation by the wife of an unrestricted right of testamentary disposition. Was this an unequivocal exclusion (competent by either law, so far as contract is concerned) of the claims to *legitim*? How could it be? The claims did not exist, nor were they contemplated, when the contract was made. The marriage was solemnized and the settlement signed, in 1877. The Act creating the *legitim* was passed in 1881.

### Separate Domicile.

In the same case, the learned judge had no difficulty in rejecting the theory that Mrs. Mackenzie had re-assumed her English domicile. She got on badly with the husband; they parted after three years of married life, and she thereafter resided in England. An application by the husband for a dissolution of the marriage failed, and she did not seek a judicial separation. It has been suggested<sup>1</sup> that a deserted wife may acquire a separate domicile for certain matrimonial purposes; in particular, to prevent the deserter from taking advantage of his own wrong, by relying on his new domicile to force her to sue him in a foreign country. But this is at best a doubtful doctrine, and Eady, J., was quite right in declining to extend it to the sphere of proprietary rights.

### The Declaration of London.

A stage further has been reached by the acceptance of the Declaration by the Colonial Premiers and by the House of Commons, which has accorded, by a comparatively small majority in a full assembly, a second reading to the Naval Prize Bill. The Colonial Statesmen are not experts in the law of Nations and would naturally accept the assurances of the Foreign Office that, things being as bad as they can possibly be, the Declaration cannot make them worse. The Commons Debate was instructive, and was marked by the definite entry of Mr. Balfour into the field as an opponent of the Declaration. Three or four days previously he had spoken at a crowded meeting in the City of London in the same sense. It is extremely to be regretted that the discussion has assumed a party complexion. But the division was on strict party lines, only a handful of Ministerialists voting with the Opposition. However, as the

<sup>1</sup> See *L. M. & R.*, Aug. 1906, p. 469



Government has laid stress from the first on the necessity of obtaining the co-operation both of the House of Lords and of the House of Commons in the matter, it is to be supposed that the opinion of the Lords will be decisive, when expressed. Whether they will care, at the present crisis, to express an independent opinion, may be open to doubt.

TH. B.

#### VIII.—NOTES ON RECENT CASES (ENGLISH).

THE Australian Courts came to a strange decision in *Smith v. Cook* (L. R. [1911], A. C. 317). There a father by his will gave his trustees an absolute discretion to make a daughter an allowance not to exceed £800 per year out of the income of his residuary estate. Under this power the trustees allowed her £400 per year. Subsequently the daughter's sister by her will gave her trustees a precisely similar discretion. After the sister's death, the trustees of the father's will reduced the annuity to the daughter to £100, while the trustees of the sister's will allowed her £700. The plaintiff, who was interested in the residuary estate under the sister's will, brought an action to compel the trustees of the father's will to contribute under the discretion an equal half of the £800 which the daughter was now receiving, and the Australian Court held that they were bound to do so! One of the Australian judges said he could find no case supporting the principle, which he said, was that of equitable contribution; but he was sure it existed. The first part of this remark is not surprising if the latter part is. If he had only looked now for cases *not* supporting the principle he could easily have found lots of them.

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In *In re Hartland, Banks v. Hartland* (L. R. [1911], 1 Ch. 459), Swinfen Eady, J., held that where a statute extended

equally to England and Scotland a judge of first instance in England should consider himself bound by a decision of the Court of Session. Here the statute in question (Finance Act 1894) was a taxing Act, and, in view of the necessity of uniformity in interpreting such Acts, the practice has been for Courts in each of the Three Kingdoms to hold themselves bound by the decisions of a Court of the same standing in any of the others. But the learned judge does not confine his *dictum* to taxing Acts merely. Surely hitherto English Courts have not held themselves bound by decisions of Scotch and Irish Courts on ordinary general statutes, or in the case of Ireland on the Common law? For instance, would an English judge feel himself bound to follow the Irish decisions on the Emancipation Act to the effect that gifts to monastic orders are void? I doubt it.

Two rather curious points were decided in *Central London Railway Company v. City of London Land Tax Commissioners* (L. R. [1911], 1 Ch. 467). The first was, that when land is freed from the land tax so are all future works erected on and under such land. The other point seems to me more questionable. It is that where the land tax on land is redeemed, there is no presumption that the redemption extends over the adjoining highway *ad medium filium*. This was held on the ground that a highway being ordinarily incapable of beneficial occupation and therefore not liable for taxes, there can be no presumption that, when the adjoining land which is liable for taxes is freed from such liability, it is intended to free the highway from a liability which then in fact does not exist.

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The principle that as regards debts and pure personalty, the Statute of Limitations does not extinguish the right, but merely bars the remedy by action, has caused much difficulty, especially in connection with mortgages which include both

realty and such interests as life policies (see *Charter v. Watson*, L. R. [1899], 1 Ch. 175, and *cf. London and Midland Bank v. Mitchell*, L. R. [1899], 2 Ch. 161), and with the administration of estates (see *Lacons v. Warmoll*, L. R. [1907], 2 K. B. 350). Another instance of this is *In re Robinson, McLaren v. Public Trustee* (L. R. [1911], 1 Ch. 502). There a trustee under a common mistake of fact, overpaid a *cestui que trust*. It was not till after more than six years and the death of the *cestui que trust*, that the mistake was discovered. The person who should have received the money then sued the Public Trustee, who was administering the estate of the deceased *cestui que trust*. The Court held that the action was barred on analogy to the statute as applicable to money had and received. If the Court had been administering the trust itself, then if any funds due to the overpaid *cestui que trust* were in its hands, it would have appropriated them to pay the plaintiff who was nevertheless by statute unable to recover anything.

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In *In re Oddy* (L. R. [1911], 1 Ch. 532) Parker, J., has laid it down that there is an appeal to the Court from all decisions of the Public Trustee under the Public Trustee Act 1906, and probably from all his acts or omissions in the performance of his duties under it. That there should be any doubt on the point shows how very badly that Act is drawn. But the learned judge pointed out a still graver defect. Under sect. 13 (1) there is given to everyone interested, however slightly, under the trust an absolute right to have the accounts of the trust investigated and audited from the very commencement of the trust. As his lordship points out (at p. 538), that clause would seem to re-introduce into the administration of trusts one of the abuses which during the whole of last century judges were trying to get rid of.

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Another defect, or rather several other defects, came out in *In re Leslie's Hassop Estates* (L. R. [1911], 1 Ch. 611).

There the question was whether the Public Trustee could be appointed a sole trustee where the trust instrument expressly required that there should be not less than three trustees. The learned judge (Eve, J.) held he could be, though to hold this he had to hold also that the Public Trustee Act repealed by implication sections of two other Acts to which it made no reference. It was also pointed out that the Act gave the Public Trustee, whom it makes a corporation *sole*, no express power to hold either land or chattels. Now, land vested in a corporation is, by the Mortmain and Charitable Uses Act 1891, liable to escheat unless the corporation is authorised to hold land by statute or royal licence. Accordingly, such a licence had to be given to the Public Trustee in 1908. But at Common law a corporation *sole* has no power to hold chattels at all, and nothing can empower it to do so except an Act of Parliament! So Eve, J., had to hold again that the Public Trustee Act 1906 had impliedly authorised the Public Trustee to hold chattels. There seems to be as much implied in the Act as in Lord Burleigh's famous nod. These and other defects in the Act were pointed out in this Magazine so long ago as November, 1907 (see p. 68, Vol. XXXIII).

*Bath v. Standard Land Company Ltd.* (L. R. [1910], 2 Ch. 408) has been on one point reversed by the Court of Appeal (L. R. [1911], 1 Ch. 618). That point is, that though a land company is in a fiduciary position towards its client, the directors of the company are not, and so may make profit out of the management of the client's property of which their company is trustee. This decision is in my opinion much to be regretted. All the evils which the rule against a trustee making profits was intended to avert, seem just as likely to arise when the profits are made, not by the trustee, but by the persons who manage the trustee. And now that corporations are taking so much to the work of

trustees, it is especially desirable that the directors should have no personal interests in the property of which their company is trustee. Fletcher Moulton, L.J., dissented. It is to be hoped that this will encourage the client to carry the case to the House of Lords.

The following decisions are to be noted:—A mortgagee who improperly refuses to convey on tender of the debt with interest and costs, is not entitled to claim interest after such tender, and is liable to the costs occasioned by his refusal to convey (*Rourke v. Robinson*, L. R. [1911], 1 Ch. 480). The old presumption that where a husband and wife together mortgage the wife's property the mortgage is *prima facie* to secure the husband's debt, is still good, notwithstanding the comments upon it of Lindley, M.R., in *Paget v. Paget* (L. R. [1898], 1 Ch. 474, at p. 475), *Hall v. Hall*, (L. R. [1911], 1 Ch. 487). A latent defect in property undisclosed to the purchaser, though known to the vendor, does not necessarily prevent specific performance against the purchaser (*Shepherd v. Croft*, L. R. [1911], 1 Ch. 521). The old jurisdiction of the Court of Chancery to restrain a litigant by injunction from proceeding with an action in another Superior Court still subsists (*In re Connolly Brothers, Limited*, L. R. [1911], 1 Ch. 731). Lastly, when a legal tenant for life, without impeachment of waste, recovers damages for dilapidations from the lessee of a previous life tenant, such damages are not capital money, but can be retained for his own use (*In re Lacon's Settlement*, L. R. [1911], 2 Ch. 17).

J. A. S.

Under a repairing lease, such as that in *Angel v. Jay* (L. R. [1911], 1 K. B. 666), the position of a tenant of an insanitary house is a grievous one; and if his tenancy was induced by a mis-statement that the drains were in good order, his irritation under the mephitic burden would

naturally drive him to seek relief. But if the misrepresentation was what the law looks upon as innocent and the lease has been executed, he would move the law in vain. A hundred years ago, Lord Chancellor Manners, in the Irish case of *Legge v. Croker* ([1811], Bell & Beatty, 506) said, "where the parties have expressed their meaning by a lease that has been with due deliberation executed, and where there is no wilful misrepresentation, it would be dangerous to correct this deed." The plaintiff in *Angel v. Jay* could, before the lease was completed, have guarded himself by proper precaution against the liability to put the drains in order at his own cost, which the decision against him involves.

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Another case which is hard upon the lessee is *Lurcott v. Wakely and Wheeler* (L. R. [1911], 1 K. B. 905). It is not surprising that people who take old houses under covenants to repair and keep in good condition have often only a vague knowledge of their obligations, for the authorities are not consistent with one another, and even contemporary reports of the same case do not always agree. For instance Tindal, C.J., in *Gutteridge v. Munyard* [1834], is reported in 7 C. & P. 129 as saying, "when a very old building is demised" and the lessee has covenanted to repair, "it is not meant that it should be restored in an improved state, nor that the consequences of the elements should be averted." But the report in 1 Moo. and R. 334, which conveys the impression of being more nearly verbatim and is certainly more decisive as to the burden on the lessor, quotes the Chief Justice's words as being "what the natural operation of time flowing on effects, and all the elements bring about in diminishing the value, constitutes a loss which, so far as it results from time and nature, falls upon the landlord." In *Lurcott v. Wakeley and Wheeler* this view is repudiated by the Court

of Appeal who, nevertheless, admit that "the question of repair is in every case one of degree." On this principle it might be thought, if the front wall of an ancient house has to be taken down owing to the weakness of age, and if rebuilt, is required by the County Council to be supported by a concrete foundation, that the cost would have to be borne by the landlord. A main part of an old structure, rebuilt with modern material under modern regulations of a modern authority, seems to give to the restored building a new character. But the ground on which the Court of Appeal hold the lessee to be liable is, that "so long as a house exists as a structure, the question whether repair means replacement does not seem material."

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In *Singleton v. Williamson* ([1862], 5 L. T. R., N. S., 644), Pollock, C.B., and Barons Bramwell, Channell and Wilde, decided that a person who neglects to fulfil an obligation to fence his land adequately is liable for all the consequences. And in *Carruthers v. Hollis* ([1838], 8 Ad. & E. 113), Lord Denman, C.J., said that, though there was no authority on the point, it was "perfectly clear that the least to be expected from a party" on to whose land sheep had strayed through his defective fence "is that he should put them back again into the place in which they were before they quitted in consequence of his neglect," and not distrain them or turn them into the high road. But *Coaker v. Willcocks* (L. R. [1911], 1 K. B. 649 and 2 K. B. 124) supplies the reasonable limitation that no more can be required of an occupier who is bound to fence than suffices to exclude cattle common to the neighbourhood, and that he can distrain against an owner who has imported a breed of unusually vaulting ambition. Though, for this reason, the decision was in favour of the defendant who distrained, for trespass on his land, sheep which had jumped over his fence, yet the case has an appearance of incompleteness

from deficiency of evidence. There is no Common-law obligation on a man to fence his own land against incursions of his neighbour's cattle, and the onus of proof of such an obligation would lie upon the cattle owner. But here for some unexplained reason the defendant seems to have admitted an obligation upon himself to effectually exclude indigenous sheep. Presumably, the obligation arose from custom or grant or some Inclosure Act.

To verify quotations and authorities and to correct proofs are a weariness of the flesh, but they have a useful purpose. In the above case it was argued, mainly on account of a statement in a leading text-book, that by the Act 1 & 2 Philip & Mary, Ch. 12, no distress of cattle may be impounded outside the hundred, "nor" more than three miles from the place where taken. In the statutes at large, the words are clearly printed, "'not' above three myles." The error is said to have gone through many editions of the text-book, and it is certainly reproduced in Vol. I of the *Laws of England*, page 383. But in Foà on *Landlord and Tenant*, at page 542, it is correctly printed "not."

"As a mark of loyalty to the Throne and of respect to the memory of His late Majesty," the borough council of Paddington resolved "to erect a suitable stand capable of accommodating the council and their friends" to witness the passage of historic personages at the funeral of King Edward VII. And in accordance with this ingenuous combination of high sentiment and parochial hospitality the stand was erected. But as it shut out the possibility of seeing the procession from part of a house, the owner of which had contracted to let the use of his window for the occasion, the action of *Campbell v. Paddington Corporation* (L. R. [1911], 1 K. B. 869) was the consequence. Though it is true there is no protection in law to a prospect



from a window if by an innocent act it is obscured, yet it is quite different when the obstruction is caused by an unlawful act. And as the corporation could only proceed by its council, it was liable for the special damage which the plaintiff had suffered from the public nuisance which the council had created. Loyalty not unfrequently exacts sacrifices from its steadfast professors.

The above case was decided on the question of nuisance caused by a public body. In *Dawson & Co. v. Bingley Urban District Council* (L. R. [1911], 2 K. B. 149), the claim was for misfeasance of a public body. There has been a wide acquiescence, justified by many decisions, that an individual cannot as a rule enforce a claim for damage caused by the omission of a public body to perform a duty imposed upon them by statute. And, apparently on this ground, the judge at the trial on circuit gave judgment for the defendants in an action brought against them for having, by misdirection to the position of a fire plug, failed in their obligation under sect. 66 of the Public Health Act 1875 to denote correctly the situation of the plug; by which misdirection time was lost in subduing a fire and avoidable damage occasioned. As the jury had found misfeasance, the High Court allowed the appeal on that ground. But the case has an interest and weight much beyond its immediate effect. The dividing space between non-feasance and misfeasance is often a narrow one, and Lord Halsbury, in *Shoreditch Corporation v. Bull* ([1904], 90 L. T. R. 210), suggested that some day the convergence of the two in certain cases might have to be considered. Now, although it was not necessary to decide the point, the Court of Appeal, in a considered judgment, have distinctly announced the opinion that mere negligence in the performance of a statutory duty may be misfeasance on the part of a public body. The omission apart from the statute may be not actionable, but the

statute, Farwell, L.J., suggests, makes it actionable. And Kennedy, L.J., suggests, that if the breach of statute had consisted of no more than mere omission to set up the denoting plate, an action on the case could have been sustained against the defendants. One immediate practical effect of the judgment will probably be that urban authorities will verify the plug directions in their own districts.

T. J. B.

### SCOTCH CASES.

The case of *Lamont v. Rodger* ([1910], 2 S. L. T. 314), is one of the most important recently decided in the Scottish Courts. It was a milk prosecution, in which a farmer was charged with selling milk below the standard laid down by the Sale of Milk Regulations, which provide that if milk falls below a certain standard, it will be presumed that the milk is not genuine, and refer back to section 6 of the Sale of Food and Drugs Act, which penalises anybody who sells an article, not of the nature, substance, and quality of the article demanded by the purchaser. The question came to be, if it were proved that the milk was sold as it came from the cow, but on analysis was found to be below standard, could the seller of the milk be subjected to a penalty under the Sale of Food and Drugs Act? On this point there are two English decisions, *Smithies v. Bridges* (L. R. [1902], K. B. 13), in which it was laid down, that though the milk might be the direct product of the cow, yet, if the cow was not in fact producing milk but another liquid, the vendor, though acting in good faith, ought to be convicted. As against this view, there is *Wolfenden v. McCulloch* (92 L. T. 858), where it was decided that if there was no averment of disease, or unusual treatment of the cows tending to cause them to produce inferior milk, or any facts in the knowledge of the seller interfering

with the cows producing normal milk, then if it were proved that there was no *de facto* adulteration of milk after it left the cow, there could be no offence under the statute. The result of these two decisions was, that if milk on analysis turned out to be below standard, an exceedingly heavy onus was laid on the seller of displacing the presumption laid down by the Sale of Milk Regulations that the milk was not genuine. It is here that the importance of *Lamont v. Rodger* comes in. There the accused attempted to clear himself from the charge of selling defective milk by proving by the testimony of himself and his servants, but without corroboration from other impartial testimony, that no adulteration of the milk had taken place. He gave evidence himself, and called his mother and his farm servants as witnesses, who all denied that the milk had been tampered with in any way. The Sheriff held that he had failed to rebut the presumption. An appeal by stated case was made, and it was held that the presumption that milk below standard was not genuine might be rebutted by the evidence of the accused and his family and servants without independent witnesses. The decision is bound and indeed has already begun to radically influence the practice in milk prosecutions in Scotland.

A good illustration of the discretionary powers of directors is furnished by *Young v. Brownlee & Co. Ltd.* (48 S. L. R. 462), and a practical lesson from it is that a shareholder's remedy, if he is not pleased with the management of the Company, may be not to have the directors compelled to do what he thinks they should do, but to have them removed from office, provided he can persuade his fellow shareholders to that end. Young, a shareholder in Brownlee & Co. Ltd., brought an action against the Company to have it declared that in issuing their Balance Sheets they were bound to enter the stock at not less

than its true value. He made no allegation of fraud against the directors, but averred that they had entered the stock at less than its true value with the result of concealing from the shareholders the fact that profits were being earned in excess of what appeared in the Balance Sheets. He maintained that in doing so they had acted *ultra vires* of the Memorandum of Association and of the Companies Acts. The Court dismissed the action as irrelevant. Lord Dundas said that he was not prepared to lay it down as a general proposition that it was illegal for directors to make a low valuation of stock or other assets in order to create a reserve in view of future and contingent liabilities. He thought that such action was *prima facie* within the region of their discretion, and could not be challenged in the Law Courts by a dissatisfied shareholder. Cases might no doubt be figured where a particular mode of valuation might be illegal, and therefore liable to be restrained by the Court, *e.g.*, the converse case of over valuation, which might be held to be illegal, if it involved the danger of dividends being paid out of capital. But here, in the absence of any allegation of fraud, it was impossible to hold that what the directors had done was beyond their powers or outside the sphere of their discretion.

It is a doctrine of the Common law that any obligation founded on a *pactum illicitum* is void. Instances of the principle being applied are not of frequent occurrence, but it was pleaded in defence in *Smith & Sons v. Buchanan* ([1910], 2 S. L. T. 387), where, after a proof, the Lord Ordinary found that a partner of the pursuers' firm obtained the defender's promise to pay the sum sued for by agreeing not to prosecute the defender's son for embezzlement, and held the obligation founded on to be void.

It was decided last year that the Parks vested in the Corporation of Glasgow, and held by them for the use of the public, fell to be entered in the Valuation Roll at nominal value only. This year the Valuation Committee in applying that decision exempted from assessment, not merely the Public Parks of Glasgow, but the Museums and Art Galleries erected within the Parks. An Appeal was taken, and the question as to whether such subjects should be entered in the Valuation Roll at their true annual value or not has been decided. (*Parish Councils of Glasgow and Govan v. The Assessor for Glasgow* [1911], 1 S. L. T. 453.) The Court held that, as the Glasgow Corporation have a statutory power of levying reasonable charges for admission to the Museums and Art Galleries built in the Parks, these buildings were revenue producing subjects and could not be regarded as destitute of annual value in the sense of the Valuation Statutes. The Court accordingly held that, though the Parks themselves fell to be entered at nominal valuation, the buildings, on the principle above mentioned, should be distinguished for purposes of valuation and entered at their value.

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If the parties to a contract intend to settle any disputes arising out of it by arbitration, they should unmistakably express that in their contract, for it requires clear and distinct language to oust the ordinary jurisdiction of the Courts and substitute other procedure. In *McConnell & Reid v. Smith* ([1911], 1 S. L. T. 333), sale notes constituting a contract had on them a printed side-note in these words:—"Any dispute under this contract to be settled according to the rules of the Glasgow Flour Trade Association." It was argued that this side-note incorporated in the contract the constitution and rules of that association, in particular one of such rules which laid down that all disputes connected with that trade should be decided by

two arbiters mutually chosen. One of the parties to the contract was not a member of the Association. The Court, while expressing no opinion as to the effect of such a note in a question between members, held, that as regards a non-member who had never seen the Association's rules, the side-note did not amount to reasonable notice, that in entering into the contract he was giving up his Common-law right of recourse to the ordinary Courts, and was agreeing to submit to arbitration.

*Clelland v. Robb* ([1910], 2 S. L. T. 408) was an action brought by the father of a boy who was killed by the kick of a horse. The Lord Ordinary allowed an issue, and the legal point on which he based his judgment was the following quotation from *Blyth v. Birmingham Waterworks Co.* (L. R. [1856], 11 Exh. 784): "Negligence is the omission "to do something which a reasonable man, guided by those "considerations which ordinarily regulate the conduct of "human affairs would do, or doing something which a "prudent and reasonable man would not do." The Lord President and Lord Kinnear adverting to this *dictum* said, that though it was a good one, and quite appropriate in the case in which it was given, it must not be assumed, as the Lord Ordinary seemed to do when he quoted it, that negligence *per se* was sufficient to make liability. It will not do so unless there is first of all a duty which there has been failure to perform through neglect. Lord Kinnear quoted Sir Frederick Pollock's definition, "Neglect "will not be a ground of legal liability unless the party "whose conduct is in question is already in a situation "that brings him under the duty of taking care." We draw attention to these remarks for the reason that a clear statement of duty to take care is not always to be found in actions based on negligence.

## IRISH CASES.

Two cases on remoteness of limitation illustrate the difficulty of laying down strictly logical rules on this thorny subject. In both, substantially, there was a covenant creating an option which, if exercised, might put an end to a rent-charge at a period outside that allowed by the rule against perpetuities; but in one of the cases the covenant was held valid, in the other void.

The first case is *In re Garde Browne* ([1911], 1 Ir. R. 205). A fee-farm (conversion) grant contained a covenant that the grantee, his heirs or assigns, might "fine down" the fee-farm rent to a peppercorn on paying sixteen years' purchase of the rent. This was held not to be void for perpetuity: but the Court (Walker, L.C.) was frankly unable to find any very satisfactory reason for its decision beyond the recognised principle that many covenants contained in leases are exceptions to the ordinary rule on this point. "It may be difficult to state any logical reason why covenants for renewal, and to fine down rent, should stand on any different footing from such an option as was given in *Gomm's Case* (20 Ch. D. 562); but there has been from long usage an exception, recognised at all events in Ireland, in the case of covenants for renewal and to fine down rent, which it is too late to call in question, except perhaps in the Court of ultimate appeal."

The second case is *In re Donoughmore's Estate* ([1911], 1 Ir. R. 211). A deed granted a rent-charge to two persons named, and to the survivor of them and the executors administrators and assigns of the survivor, for 999 years, with a declaration of trust in favour of a charity. There was a proviso that if the grantor's heirs, executors, administrators or assigns should, on any of the days named for payment of the rent-charge, pay to the named persons or the survivor or the executors, &c., a lump sum of £300, the rent-charge should determine. This proviso was held void for perpetuity, and the decision is clearly logical

on the authorities. Any limitation, condition, proviso, or option which would have the effect of transferring an interest in property from one person to another (unless it be from one charity to another) outside the period allowed by the rule, is void: but this rule cannot be strictly applied to covenants in leases.

“Assigning to a pauper” is a recognised way of getting rid of onerous property: floating a little company is sometimes an effectual way of getting an individual out of difficulties: but an attempt to combine these two processes failed, in *Cummings v. Stewart* ([1911], 1 Ir. R. 236). A person had acquired a licence to use a patent, subject to a liability to make fixed payments to the patentee during a number of years. The licensee’s working of the patent did not apparently prove profitable, and in order to get rid of his liability for the payments he bethought himself of a provision in his licence authorising him to transfer it “to any limited company he may form to carry on his business, or the business connected with and arising out of the said patents and this licence.” He thereupon formed a private company, consisting of two shareholders each with a one-pound share, transferred the licence to it, and claimed to be free from royalties. The Court, however, held that such a company did not come within the clause above stated: it was not a company formed either for the purpose of carrying on the licensee’s business or of working the patents, but in substance formed merely for ridding the licensee of liability. It seems, in fact, that although you may assign to a pauper, you cannot create your pauper merely in order to assign to him.

A mortgagee’s remedy by way of foreclosure does not exist in Ireland, as it does in England. He may obtain a sale of the mortgaged property, either in the Land Judge’s Court or in the Chancery Division. This difference in the law of the two countries was considered in *Waters v. Lloyd*



([1911] 1 Ir. R. 153), and was there held to have an important effect in regard to the Statute of Limitations. A legal mortgagee made a claim, in a suit to administer the real and personal estate of a deceased owner of the equity of redemption, for the payment of his principal and interest. The debt was due for much more than twelve years; there was no proof of an acknowledgment sufficient to satisfy sect. 14 of 3 & 4 Wm. IV, c. 27; but there was an acknowledgment sufficient to keep alive an action to recover money charged upon land, within sect. 8 of the Real Property Limitation Act 1874. It was held that the mortgagee's claim, in Ireland, was an action coming within the last-mentioned section. An action for foreclosure in England would be an action to recover the land, within sect. 1 of the Act of 1874. "The remedy by sale is quite distinct in character and consequences from an action of foreclosure. In Ireland, by a sale, there is recovered only the money, and the surplus proceeds belong to the mortgagor."

*Attorney-General v. M'Carthy* ([1911] 2 Ir. R. 260) is interesting from the Lord Chief Baron's review of the *jus alluvionis*—the law as to gradual accretions to a foreshore—from the time of Bracton down. The test deciding whether the property in such accretions is in a private owner of the foreshore or in the Crown is simply whether the progress of the accretion is perceptible or imperceptible. In the latter case the decision of the House of Lords in *Gifford v. Yarborough* (5 Bing. 163) is treated as a conclusive authority for saying that, where land is added to the sea-shore by the gradual and imperceptible action of natural causes, the owner of the land adjoining the accretions acquires a good title to such accretions against the Crown, even though there exist marks and boundaries whereby the position of a former line of ordinary high water can be ascertained.

J. S. B.

## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*The Common Law of England.* 2 Vols. By W. BLAKE ODGERS, K.C., and WALTER BLAKE ODGERS. London: Sweet & Maxwell. 1911.

Although on the title page this is described as being the tenth edition of Broom's *Commentaries on the Common Law*, it is more accurately, perhaps, stated in the Preface to have been written to take the place of that work, as the present Authors have adopted "a different plan of composition and a different arrangement of the subject-matter." Use is made of different types to distinguish the leading principles of the Common law from the illustrations given of them and details of decisions. The Criminal law is put in a position of more importance as being, in the opinion of the Authors, a branch of their subject "which it is most important for every citizen to learn." The amount of labour involved in covering so vast a field can well be understood when it is noticed that the Authors say the work has occupied them nearly five years. As far as we have been able to examine it, it seems to us to cover the ground as completely as can be wished in a work of this sort; and not least valuable are the Chapters on procedure civil and criminal, or as they are called, "Adjective law." We have noticed a slip or two in the Criminal law which, in consequence of the above-quoted opinion, we have examined with some little care. It has not been noticed that the period limited for prosecution under sect. 5, sub-sect. 1 of the Criminal Law Amendment Act 1888 has been extended from three to six months by 4 Edw. VII, c. 15, sect. 27. The punishment for offences under the 58th sect. of the Larceny Act 1861, is penal servitude for not more than five or less than three years, or imprisonment, etc., not, as stated, penal servitude for three years or imprisonment, etc. We notice that it is not mentioned that the decision in *Lowery v. Walker* in the Court of Appeal has been reversed by the House of Lords, but we imagine that is because the latter decision was reported too late to be included.

*The Law of Light.* By R. G. N. COMBE. London: Butterworth & Co. 1911.

The law of light has been much affected by the decision of the House of Lords in the well-known case of *Colls v. Home and Colonial Stores*, decided in 1904. That case decided that the easement of light differed from other easements in being "no more than the right to be protected against a particular form of nuisance." A number of important questions have thus arisen on which decisions have not yet been given, and the authority of most of the reported cases has been considerably affected by this new conception of the nature of a light easement. These considerations have induced the Author to write this treatise to supply what he considers a real want. He treats the subject thoroughly from this new standpoint, examines the cases with this principle well before him. Although the Author expresses the opinion that it is not within the scope of a text writer to "dilate upon matters of speculation," yet, we are glad to say, that he "has felt justified, when the more important questions are barren of authority, in laying forth some of the considerations to which the Courts will no doubt have regard when occasion arises." We think it very desirable that an Author who has devoted great study and ability to a subject, should endeavour to help his readers to form their opinions on difficulties as yet uncovered by authority. Particular care has been devoted to the difficult subject of Prescription. Three Chapters have been devoted to it, and the Author speaks almost pathetically of "the singular indifference" with which the provisions of the Prescription Act 1832 have been treated.

*The Law of Prohibition.* By H. R. CURLEWIS and D. S. EDWARDS. With a Chapter on the Practice in England, by F. J. WROTTESELY. London: Sweet & Maxwell. 1911.

The Authors of this treatise, who are, we believe, members of the New South Wales Bar, have with immense industry prepared a work for which the reports of the Courts of England and Ireland, the High Court of Australia, the Supreme Courts of the States of the Australian Commonwealth, and of the Supreme Court and the Court of Appeal of the Dominion of New Zealand, have been searched for decisions on the subject matter in order to arrange them on a complete system. The principles of the law, as well as illustrations of them, are largely set out in quotations from judgments. This

ample quotation has also been adopted for the benefit of practitioners who are not able to obtain access to all the reports. The book is mainly concerned with Common-law prohibition, which fills the whole of Part I and covers about 450 pages. In the Preface the subject of Part II is said to be "Statutory Prohibition" which is also said to be unknown in England. As far as we can make out, Part II is entirely concerned with the matters mentioned in its heading, "Parties, Practice, Costs (England)," and no mention is made of such a term as "Statutory Prohibition," nor does it occur in the Index.

*A Digest of the Civil Law of Ceylon.* Vol. I. By P. ARUNACHALAM, M.A. London: Stevens & Haynes. 1910.

The plan of this work comprises five Books: Book I being General; Book II, The law of Obligations; Book III, The law of Things; Book IV, The law of the Family; Book V, The law of Succession. The main Parts of Book I in the present volume consist of a general treatment of Persons, Things, and Juristic Acts. The avowed object of this work is to form the ground-work for the general codification of the law of Ceylon. The trend of modern opinion is in favour of codes, and we believe that we are right in saying that in another large colony where Roman Dutch law is in vogue, namely, in South Africa, a Commission is to be, or has been, appointed, under the Chairmanship of Sir Melius de Villiers, to codify and unify the law. The learned Author has special qualifications for the task he has undertaken, being a member of the Legislative Council of Ceylon. Some of his comments on Roman Dutch law are a little far-fetched. For instance, he speaks of it as consisting in "for the most part a huge indeterminate mass of legal lore buried in tomes of mediæval Latin and Dutch which are the terror of the modern lawyer. He has scarcely the courage or the patience to explore what seems a gloomy and intricate forest guarded by old-world dragons." Most of the Dutch commentators wrote either in Latin alone, or their works were translated into Latin as well as being in Dutch, the "old-world dragons" being Latin that any boy with a good Public School education could translate without much difficulty. Moreover, so much of modern law is in the form of Statute, that a very deep knowledge of Roman-Dutch Common law is unnecessary. The learned Author displays a profundity of knowledge and an accuracy of research which, if applied to future volumes, should make the completed work useful, not only to the student and lawyer, but also to the legislator.

*Proposed Changes in Naval Prize Law.* By T. E. HOLLAND, K.C., D.C.I.. London: The Oxford University Press. 1911.

*Britain and Sea Law.* By T. BATY, D.C.L., LL.D. London: G. BELL & Sons. 1911.

The Declaration of London has aroused much controversy by reason of its far-reaching effects. This controversy has been much embittered by the introduction of politics, with which this Journal has no concern. To the average man in the street who is not concerned with the legal aspect of the case, most of the discussion appears to be purely academic. The average man would seem to argue, and rightly so as appears to the writer of this notice, that if England were a belligerent, her naval commanders would do just what they thought best in the interests of their country irrespective of fifty Declarations of London. If England were a neutral, again, her navy is strong enough to see that the ills prophesied were not brought about, as any nation at war would think many times before she sank British vessels. Most international lawyers in England appear to be of opinion that the Declaration places Great Britain in a worse position than she was before, and that the document in question is not merely declaratory of the law. Professor Holland's paper, read May 31st 1911, points out the main arguments against the Declaration and the covering Report, and gives his objections to the Naval Prize Bill. This publication will be read most carefully by a large circle of readers. The reason of this lies in the fact that Professor Holland not only is destructive in his criticism but is constructive in his suggestions.

Dr. Baty's work, whilst not dealing exclusively with the Declaration, is probably written because of it. It comprises seven Chapters, each of which deals with some important point of Prize law, such as Contraband, Destruction of Neutral Ships, Procedure in Prize Courts and Means of Constraint, etc. Dr. Baty lays great stress on the institution of an International Prize Court, and that really is the main ground for objection on the part of the British Commercial community. Such a Court, it is urged, will be expensive, cumbersome, not free from the taint of partiality and not representative; how then can a commercial man have any confidence in it? Like most compromises it satisfies nobody.

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*The collected Papers of Frederic William Maitland.* Edited by H. A. L. FISHER. 3 volumes. London: Cambridge University Press. 1911.

To give a detailed Review of the writings of Frederic William Maitland would not only take up too much space, but would also be in the nature of an impertinence. Professor Maitland combined with a colossal genius a versatility and wide range of knowledge given to few men. His knowledge was definite and well-tabulated; moreover, he possessed the rare gift of treating an abstruse subject in a lucid way which appealed to, and was understandable, by the least initiated of us. Speaking from memory, we think that we owe to Mr. Fisher a sympathetic *Life of Professor Maitland*. If that is so, he has made a fitting complement to that work by collecting and editing the writings of the same great scholar. It is sufficient to glance through the three volumes to enable the reader to see the wide range of subjects touched upon and adorned by the writer. Of course Mediæval law was Professor Maitland's great subject, and essays on that and kindred subjects form the greater part of the contents. But biographical notices, modern law, current political matters, philosophical subjects, all show the "infinite variety" of the man. Obituary notices of friends, such as Henry Sidgwick, Mary Bateson, and Leslie Stephen, show not only his appreciation of their assistance to him personally, but reflect the kindly sympathetic side of a great mind. The writer of these lines has not only had the privilege, but has also tasted the intellectual enjoyment, of reviewing many of Professor Maitland's writings during the last few years, and the present collection will be a memento of a great scholar who unfortunately is no longer with us.

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*War Rights on Land.* By J. M. SPAIGHT, LL.D. London: Macmillan & Co. 1911.

The Author of this admirable book has both high academical honours and experience of military affairs; it may be on account of this combination that his work is so singularly free from the ineptitudes which often disfigure the literary treatment of war. Nothing that we have read goes straighter to the heart of problems; nothing solves them with a more accurate and decisive touch or with greater fairness. Dr. Spaight commences with a useful discussion of the nature of International law, which he quite rightly concludes to be genuine law; though we think it is not so much on

account of the fear of public opinion or the fear of any definite reprisals that it is observed, but rather on account of the utter uncertainty as to the consequences which must follow a breach of it. Dr. Spaight justifies the devastation campaigns of Sherman and Sheridan on the ground of the advantage which accrued through them to the Federal military operations. But he might with equal justice approve the devastation of the Palatinate by Louis XIV. It provided a belt of waste land as a frontier, just as Sheridan's work provided a zone of waste land where a fertile passage had previously been. And since he admits that no army can subsist on its own magazines, he implicitly countenances a systematic policy of mutual ravage. Dr. Spaight's approval of the bombardment of occupied (as distinguished from defended) towns strikes us as in flat contradiction with the terms of the Hague Convention. The presence of a half-company of troops in a commercial town cannot draw upon it the fate of Gomorrah. The Author's remark that a belligerent may stop neutral traffic with the enemy is so generally expressed as to be misleading; and Calvo, for all his European reputation, was not an Italian, but an Argentine. The Author says that no one of whatever nationality can affirm that the refusal of quarter in the Indian mutiny was not justified. Legally, of course, it was. Morally, we take this opportunity of affirming very emphatically that it was not. What the Author says on this subject at p. 90 cannot be reconciled with his better mind at p. 267, for the Mexicans were just as much rebels as the Indians. The work is well documented, and the Author has diligently studied the histories of recent wars. We observe some laxity on the part of the proof-reader, which should receive attention in the next edition.

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*The Law relating to Electricity.* 2 Vols. By C. M. KNOWLES, LL.B. London. Stevens & Sons. 1911.

Each volume of this work is a complete book dealing with separate subjects, and quite independent of the others. The first volume contains the statutory provisions and rules which regulate the generation, distribution, and use of electricity for lighting and power generally. The second volume deals with electric traction only. The general legislative provisions dealing with the distribution of electricity—primarily for the purpose of providing light, though incidentally it may be supplied for other purposes—commenced with the Electric Lighting Act 1882. Experience showed

that Act to be defective and unsatisfactory in many respects and it has since been several times amended and modified. The last Chapter of this code is contained in the Electric Lighting Act 1909, which came into operation on April 1st 1910. Under the law, as now fixed by Parliament, the Board of Trade has large powers for granting Provisional Orders for the establishment of Electrical Undertakings, authorising the compulsory acquisition of land for generating stations, breaking up streets for distributing mains, supplying electricity in bulk for various purposes, and generally for making such provisions as may seem necessary for regulating such undertakings in the interests of the public without unduly hampering their business. Volume II deals with the Tramways Act 1870 and the Light Railways Act, 1896, under one or other of which powers for the construction and working of an electric tramway must be obtained. Under the earlier Act a Provisional Order authorising the construction of a tramway has to be obtained from the Board of Trade and confirmed by Parliament; the later Act empowers the Light Railway Commissioners to issue an order authorising the construction of a light railway (the term is not defined, but in practice may include any tramway). Such order only requires confirmation by the Board of Trade, unless they consider that the magnitude of the undertaking renders the consent of Parliament necessary. Powers for electrifying ordinary railways have been given by a later Act passed in 1903. The Electric Lighting Acts and certain clauses of other general Acts—as well as the special Acts applicable to London—are set out in Volume I: the Tramways Act 1870, the Light Railways Act 1896, and the Railways Electrical Power Act 1903, in Volume II. These are followed in each case by model orders, bill and clauses, which should be useful for promoters and opponents of new schemes. The notes seem clear and accurate as far as a cursory investigation enables one to form an opinion. The cases cited cannot as yet be very numerous, but the effect of the decisions given up to the present time is set out in the proper places. The Index seems to be adequate.

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*Selected Cases illustrating the Law of Contracts* By A C CAPORN and F M CAPORN. London: Stevens & Sons. 1911.

The object of this work is to impress on students the principles of the Law of Contract and illustrate them in a manner which is



best done by reference to decided cases. The Authors go through the Law of Contract chronologically from "Offer" to "Damages," giving the essential facts from decided cases and extracts from the judgments "which best explain a principle in the shortest possible space." As may be expected, this task requires considerable skill and knowledge in selection and abridgment, but it has been satisfactorily accomplished, and the book can safely be recommended to all students as sound and useful. The second part deals with some special commercial contracts, such as "agency," "negotiable instruments," "sale of goods," "carriage of goods." We notice a few clerical errors, such as "Willis, J." instead of "Willes, J.," which curiously enough occurs more than once; and "Lord Chief Justice Knight Bruce," instead of "Lord Justice Knight Bruce."

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**Second Edition.** *The Law of Ejectment.* By J. H. WILLIAMS and W. B. YATES. London: Sweet & Maxwell. 1911.

The result of a lapse of more than sixteen years has necessitated the addition of a large number of cases and the consideration of several statutes, notably, the Land Transfer Act 1897, and the Agricultural Holdings Act 1908. The Law of Ejectment is a very technical one, and every step has to be and is carefully described in this volume. However, in spite of all the Authors' care and labour, we do not envy the Justice of the Peace who has to award restitution after a forcible or unlawful entry and detainer. We suspect that he would, if possible, avoid having to act. One of the most difficult parts of the Authors' task must have been to decide how much information to give on the numerous branches of law connected with ejectment, such as the law of Mortgages, the law of Wills, etc. This part might have been indefinitely expanded, but we think the Authors have exercised a wise restraint, while giving as much as the practitioner is likely to want without having to go to special treatises on such subjects. The Index is perhaps a little too concise. A practical merit of the work is its physical lightness.

**Second Edition.** *A Treatise on Statute Law.* By W. F. CRAIES, M.A. London: Stevens & Haynes. 1911.

This book is founded on Mr. Hardcastle's work on Statute law, which originally appeared in 1879. Mr. Craies subsequently edited Mr. Hardcastle's treatise, and in 1907 brought out the book in his own name, and now finds another edition is required, bringing the

law down to the end of the year 1910. The general principles to be adopted in ascertaining the meaning of a statute are now fairly well established and to be found in recognised text-books, such as the one now before us, but new points come from time to time under the consideration of the Courts. Modern legislation furnishes frequent examples of very extensive administrative powers being vested in high officers of State, and experience shows that the officials concerned are disposed to exercise those powers in a somewhat arbitrary manner. The Courts have had to consider more than once how far such powers are subject to control. This question was examined by the Court of Appeal in the case of *R. v. Board of Education*, in the year 1910, which is dealt with and critically discussed in the first Chapter of the book. In Chapter IX, a matter of growing importance to students of jurisprudence is dealt with in some detail, *viz.*, the effect of statutes passed by the Legislatures of the various colonies and dominions comprised within the limits of the British Empire. Within the areas over which their jurisdiction extends, and subject to the instrument from which they derive their authority, whether Proclamation, Charter, Order in Council, or Imperial Statute, each of these Legislatures is sovereign; but the Courts have frequently had to consider whether a particular enactment was or was not *ultra vires*; and if not, what construction should be placed upon it. The status of the different legislative bodies varies greatly. There are now three Federal Parliaments conducting the affairs of groups of States, which were previously subject only to the Crown, and are still in many matters independent of each other and of the Federal Legislature. Decisions as to their respective rights have been given on many points which have arisen in Canada, on a few in Australia, and so far on none from South Africa. Mr. Craies shows the principles on which these decisions have been based, which, no doubt, will be followed in the future as occasions arise. A useful feature in the book is Appendix A, which contains a full list of expressions used in Statutes, which have been judicially or statutorily explained. This now comprises nearly 100 pages, and like the rest of the book, has been brought up to date.

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**Third Edition.** *Challis's Law of Real Property.* By CHARLES SWEET. London: Butterworth & Co. 1911.

This scholarly third edition worthily supports the distinction which the first issue immediately attained when it came out twenty-six years ago. Important changes affecting real property law have

taken place since then, but the text of the second edition has been preserved; notes by the Editor, of which there are many, and all excellent, being placed in square brackets at the page foot or at the end of the chapter to which they relate. Challis's *Law of Real Property* was indeed a great and original work. No other treatise has ever set out so clearly and graphically the history and bearing of the rule in *Shelley's Case*. It may be safely said that, until the book appeared, a large number of lawyers, though acquainted perhaps with the terms of the rule, had but a vague idea of all that the rule encompassed. And this is not surprising, when so eminent an authority as Mr. Butler had stated that it was not a subject for the determination of the Court; and when this statement was adopted in the early issues of *Tudor's Leading Cases*. The learned Editor supplies, beyond foot-notes to the text, auxiliary chapters on, amongst other matters, the Rule against Perpetuities (with a suggestive note on *South Eastern Railway v. Associated Portland Cement Manufacturers*, decided last year), Corporeal and Incorporeal Hereditaments, the Real Property Amendment Act, sect. 2, and, incidentally, on the descent of a fee simple. As to the value of this Chapter, it is worth recalling that Mr. Challis said that the labour of constructing it had been the most arduous part of his work. But not only in weighty matters is the Editor elucidatory. He reminds the reader at pages 92 and 356 that the common terms "*en autre droit*" and "*pur autre vie*," should, to convey their proper meaning, be "*in autre droit*" and "*pur autre vie*" respectively. The appendices have reprints of articles from the *Law Quarterly Review*, and retain the report of *Wickham v. Iane*. The whole work seems to have been done by the Editor without assistance, except in the incidental matter of the Letters Patent of the New River Company. A final word of praise is due to the Index, which seems to be unusually full. The reference to *Shelley's Case*, for instance, sets out the thirteen essentials of the rule. One small oversight may, perhaps, be pointed out, just to prevent perplexity to a reader. The square bracket which indicates the notes of the learned Editor is placed at the head of Mr. Challis's text, from page 59 to page 63. But this is merely a printer's error, for there is no terminating bracket.

**Third Edition.** *A Digest of the Death Duties.* Vol. I. By A. W. NORMAN. London: Butterworth & Co. 1911.

Mr. Norman has a special qualification for writing on this subject, as he is Assistant Secretary of the Estate Duty Office, but he has

of course also the disadvantages of that position, as it hampers him, if it does not entirely preclude him, in dealing with debatable matters, which is often the very thing one wishes to find discussed in a standard law work. All that he does treat on is discussed with wide knowledge, and as far as we have been able to judge, with absolute impartiality. The present volume deals only with Stamp Duties. These are the Estate Duty, Settlement Estate Duty, Probate Duty, and Account Duty. The second volume will deal with Differential Duties, *etc.*, Legacy and Succession Duties. The form of the work is alphabetical, beginning with "Abolition" and ending with "Workmen's Compensation Act 1907". There cannot be many questions connected with these duties on which much information will not be found under the appropriate headings in this Digest, including the necessary forms for use in various cases.

**Fourth Edition.** *Employers' Liability and Workmen's Compensation.* By C. Y. C. DAWBARN, M.A. London: Sweet & Maxwell. 1911.

In compiling the fourth edition of his useful book on Employers' Liability, Mr. Dawbarn has ceased to deal with it in subjects, and now takes the Workmen's Compensation Act section by section with annotations. The learned Author calls attention to many curiosities in that Act, but perhaps he is influenced by his well known predilection in favour of individualism when he advocates, with amusing comments, liberty to contract out. There is a great deal to be said in favour of his view, but a great deal more can truly be said against it. Judging, too, from the learned Author's comments on the decisions upon the Workmen's Compensation Act 1906, it requires as much judicial interpretation as the former one of 1907. Attention must again be called to the excellence of the Appendices, now sixteen in number. We notice that on this occasion Mr. Boulton does not appear to have furnished his notes on Canadian cases. The present edition is got up in a workmanlike manner and gives every indication of the fact, that Mr. Dawbarn is a thorough master of his subject.

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**Fifth Edition.** *Fry on Specific Performance.* By W. DONALDSON RAWLINS, K.C. London: Stevens & Sons. 1911.

Mr. Fry, as he was then, published the first edition of this work in 1858, and it at once became the authoritative book on the subject. New editions have been published at varying intervals. The

amount of alterations and additions in each edition has of course varied considerably. Perhaps the most important additions and revision had to be made to the second edition, which appeared in 1881. Mr. Rawlins has had a long connection with the work. He revised a considerable portion of the second edition, and was solely responsible for the fourth. The present work is mostly "the re-statement with sundry additions and modifications, of matters already familiar," but more than 120 new cases have been cited, and as might be expected, not only illustrations of principles, but also developments of some of them. The learned Editor refers to some of these developments in his Preface, where he calls attention to the cases of *Halkett v Earl of Dudley*, *Measures Brothers v. Measures*, and *In re Stuckley*. It will be remembered that the work is, as it purports to be, one on principles, and though there are many cases cited in support of and as illustrative of principles, the Author and Editor have been careful to limit as far as possible the length of quotations, and there is little critical comparison of one case with another. There are, of course, when necessary, exceptions, and one long citation may be noticed from Lord Cairns' judgment in *Nickalls v. Merry*, which is quoted for the purpose of showing the practice on the Stock Exchange. This limitation of quotation much conduces to clearness in statement of principles.

**Eleventh Edition.** *Best on Evidence.* By SIDNEY L. PHIPSON. London: Sweet & Maxwell. 1911.

When a work has been in existence for over sixty years and has reached its eleventh edition, it may well be said to have established itself as an authority. *Best on Evidence* differs from many of the excellent treatises on Evidence. It deals more fully with the philosophy and theory of Evidence than most if not all of the works in daily use. It is an excellent book for a student to acquire a knowledge of principles. It was recommended to the present writer for that purpose when he was student more years ago than he likes to remember. There are longish disquisitions on such subjects as the respective merits of *fixed* and *casual* tribunals of interest to jurists, but not of much value to practitioners. We must not, however, be understood to suggest that the practical rules of evidence are not very carefully and fully considered and set out, but there is much else. One important feature of the work is the full notes of the Canadian Law of Evidence appended to various

chapters. It is interesting to notice that, according to a note on page 153, Mr. Francis Stringer was in error in contending "that the practice of kissing the book is a purely modern innovation," and "it was current at all events as early as the 11th century." Several pages are devoted to the discussion of the question whether communications made to spiritual advisers are privileged; the decisions against such privilege are critically examined, and the arguments in favour of it sympathetically commented on. It will probably be news to many of our readers that a clergyman of the Church of England was in 1905 committed for seven days by a metropolitan magistrate for refusal to state what had been disclosed to him in confession. One omission we have noticed is, that in alluding to the compensation witnesses may get in criminal cases, no reference is made to the Costs in Criminal Cases Act 1908.

**Eleventh Edition.** *Addison's Law of Contracts.* By W. L. GORDON, M.A. and J. RITCHIE, M.A. London: Stevens & Sons. 1911.

As eight years have passed since the tenth edition of *Addison on Contracts* appeared, it is apparent that great care and work would have to be expended in preparing the present one. Messrs. Gordon and Ritchie have discharged their duties as Editors in the conscientious way expected of such able writers. The general form has been preserved, and only such additions as subsequent legislation and decisions required, have been made. Mr. J. E. R. Stephens has re-written the important section dealing with Marine Insurance, requisite by reason of the passing of the Marine Insurance Act 1906. Mr. J. R. McIlraith is responsible for the chapter on Transfer of Contracts, and also for the sections dealing with Master and Servant and Contracts for Carriage. When one thinks of the volume of legislation that has been passed during the last eight years, the amount of labour involved is apparent. Such far-reaching Statutes as, to mention only a few, the Companies (Consolidation) Act 1908, the Limited Partnership Act 1907, the Workmen's Compensation Act 1906, the Agricultural Holdings Act 1908, had to be incorporated in the text and dealt with in a suitable manner. All this work has been effected more than adequately by the learned Editors, and no effort has been spared to maintain the high standard of utility to be expected of a work with such an eminent reputation as *Addison on Contracts*.

**Twelfth Edition.** *Levin's Law of Trusts.* By CECIL C. M. DALE and G. A. STREETEN. London: Sweet & Maxwell. 1911.

The name of this work is as familiar as a household word, and its fame is spread, not only wherever English law is administered, but far over seas, to all places where the principles of that law are regarded with respect and consulted as a guide. All knowledge must, to attain its full use, be readily available, and to be available in such a complicated subject as trusts, it must be held in some systematic bond, or else it will sink into chaos. And no better bond could be devised than the tabular analysis which has been a feature in past editions and is repeated in this. Although it is seven years since the previous edition was published, the chief new enactments affecting this branch of the law have been only the Public Trustee Act and the Irish Land Act 1909. And, as a consequence, the only variation which it has been necessary to make in the analysis is in Part 2, where "the Public Trustee" has been added to the sub-dividing title of "the Judicial Trustee." Notwithstanding the great number of new references which have had to be made to cases decided since 1904, the actual number of pages by which this edition exceeds the eleventh is only thirty-eight. This economy of bulk is in large part attained by the omission, as no longer necessary, of the rules made under sect. 4 of the Judicial Trustee Act 1896, and by the omission likewise of the sections of the Act subsequent to sect. 5. The provisions of the Public Trustee Act more usefully occupy some of the vacated space. When a standard work of this repute has had the criticism of the profession for as many years as this has, and has been so carefully revised in each succeeding edition, there is little to offer in the way of suggestion. But it may perhaps be said that to the statement at page 744, that "though a trustee may grant a farming lease, it does not follow that he could grant a mining lease," it might have been added that in *In re Baker, Wallis v. Baker* (88 L. T. R. [1903], 685), where there was a power to trustees to lease lands for any number of years, but no special provision as to mining leases, Kekewich, J., held that the trustee might under the power demise even unopened mines. The decision has not met with universal acceptance. But Joyce, J., in *In re Baskerville* (L. R. [1910], 2 Ch. 331) held that trustees had power to join with persons entitled to other undivided shares in granting leases of mines already opened, though he left it, if the occasion arose, to be decided by the Court of Appeal whether

trustees could be empowered to grant leases of unopened mines. But this was decided so recently that perhaps the work had gone to press. The Index has received careful attention from the joint Editor, and an examination shows that even the effect of a case reported only in the *Weekly Notes* has been referred to. The great learning of the work and the skilful arrangement of the learning will, if it is always kept up as in this edition it is, long maintain the book as a leading authority on its subject.

**Seventeenth Edition.** *Bills of Exchange.* By W. J. B. BYLES and ERIC R. WATSON, LL.B. London: Sweet & Maxwell. 1911.

The Editors have submitted this well-known work to most drastic treatment—in fact, the text has been so altered that it is hard to recognise the hardy veteran of some eighty years' standing, in its new guise. The late Mr. Justice Byles originally compiled his book in 1829, when there were few text-books in existence on this complicated subject. It had been the practice heretofore, since the passing of the Act of 1882, to give a paraphrase of the various sections, adding the new decisions to the notes as each edition came out. This system as regards the notes has certainly been followed since 1847, the date of the fifth edition. In the present edition the actual wording of the section has been given, the notes very severely overhauled, and all useless lumber cleared away, leaving only such cases as are of practical utility at the present time. As there are now so many text-books extant on the same subject, additional space has been obtained by removing many passages dealing with general principles of law and substituting references to other leading text-books. Provided that this practice is not overdone, we can conceive that, in these days of large legal libraries, it may possess many advantages. An excellent plan has been followed in giving the full text of the codifying Act of 1882 in Appendix I, with cross-references to that portion of the text which has special application to the particular point. A Table of Cases containing full references and a Table of Statutes have been included for the first time. Mr. Sydney Leader, an English and German solicitor, is responsible for the German law of Bills of Exchange and of Cheques, which appears in Appendix III. The Index is complete, and is an excellent key to the contents of the book. Great changes in a well-known treatise are always objects of suspicion, especially in the legal world, and evidence of the value of those changes made in *Byles on Bills* can only become apparent when judged by the test of practical application to everyday work.



**Thirty-first Edition.** *Handbook on Joint Stock Companies.* By F. GORE-BROWNE, M.A., K.C., and WILLIAM JORDAN. London: Jordan & Sons. 1911.

Although modestly described as only a "handbook," Messrs. Gore-Browne and Jordan's book on Company law has acquired a high reputation. As recently as June 1909, the thirtieth edition was published in consequence of the passing of the Companies (Consolidation) Act 1908. Since that date The Assurance Companies Act 1909 has been placed on the Statute Book. That Act is very far-reaching in its provisions, sweeping into its net Life Assurance Companies; Fire, Accident, and Employers' Liability Companies; and Bond Investment Companies. Stamps and Duties have been affected by the Finance (1909-10) Act 1910. The primary object of the Companies (Consolidation) Act 1908 was merely to codify the law, but by reason of the adoption of new phraseology, certain changes have in fact been made. This is exemplified by the case of *Thomas v. United Butter Companies of France* (L. R. [1909], 2 Ch. 484), where it was decided that, in the event of a reconstruction being made within the terms of sect. 192, there cannot be a sale to a foreign company. Various other important points have been decided in *Discoverers' Finance Corporation*, *Lindlar's Case* (L. R. [1910], 1 Ch. 312), and in *Russell Hunting Record Co.* (L. R. [1910], 2 Ch. 78), none of which have escaped the eye of the vigilant Authors. A useful Table is printed at p. xv, consisting of a synopsis of the provisions of the Companies (Consolidation) Act 1908, together with the corresponding sections in earlier Acts, in a way which easily catches the eye. Decisions upon Company matters reported down to February 1911, are incorporated in the text, it being the object of the learned Authors to bring each successive edition as much up to date as possible. In proof of how far the merits of this excellent work are appreciated, it is sufficient to state the following facts—namely, that the first edition was published in 1866, the thirtieth in 1909; the thirtieth edition had to be reprinted five times. The present Authors took charge in 1891, and during their period of office the book has been translated into French, and has been adapted to South African Company law and practice. As to the success of the South African edition, the writer of the present notice can testify from personal experience.

*The Administration of Justice in Criminal Matters.* By G. G. ALEXANDER, M.A., LL.M. London: Cambridge University Press. 1911.—The Cambridge Manuals of Science and Literature are not intended primarily for schools, but are written in a form acceptable to well-educated readers. Mr. Alexander has sketched out, according to a readable popular scheme, our criminal procedure in England and Wales. Starting at the lowest rung of the legal ladder, he gives an excellent account of Police Courts, Magistrates, and their Summary Jurisdiction. Part II takes us from Quarter Sessions, Assizes, the Central Criminal Court, High Court, the Court of Criminal Appeal, right up to the House of Lords. These are all described both as to constitution and procedure in a gossipy, attractive manner. The functions of the Attorney-General, and the Director of Public Prosecutions are enumerated. Part III gives a deal of miscellaneous information, which together with the Appendices make up the scope of the book. Anyone who wishes an outline of our criminal system explained in simple language can be recommended to read Mr. Alexander's book, but if the reader wishes a more elaborate description he must seek details elsewhere in a more pretentious work.

*The Law of Illegitimacy.* By WILFRID HOOPER, LL.D. London: Sweet & Maxwell. 1911.—As a historical study this book is most interesting and profound, but as a work of reference to the practical lawyer it would not be of great utility. Part I gives the history of illegitimacy in Mediæval law, and the subject is elucidated in a way it never has been before. Part II deals with illegitimacy as a status in Modern law; Part III gives us information on Proof of Legitimacy and Illegitimacy; and Part IV expounds the International law on the subject. The Appendices are interesting, as the first gives a wonderful Harleian MS. entitled *Tractatus de Bastardiu*; the second being a Form of Licence by the present Archbishop for the ordination of an illegitimate person. It will be news to most people to hear that the present Archbishop has revived the old rule that an illegitimate child cannot be ordained without a licence. Truly a case of visiting the sins of the fathers upon the children. This work, which is interesting and full of research, was the Thesis approved for the degree of Doctor of Laws in the University of London.

*Remedies of Vendors and Purchasers of Real Estate.* By C. C. McCaul. Toronto: The Carswell Co. 1910.—This work seems

to have had its origin in an attempt to condense the many conflicting cases on the subject of Relief and Forfeiture into the brief compass of a magazine article. The effort seems fortunately to have been abandoned, and the temporary interest which such a form of issue might have raised, is replaced by the more enduring existence which may be wished to the volume. It is, of course, substantially an enunciation of our own law, but its usefulness is increased by numerous references to judgments on the subject in Canada and the United States.

*The Law relating to Hire and Hire-Purchase.* By J. D. CASSELS. London: Butterworth and Co. 1911.—This is a book which may be useful to those about to tread the perilous path of hire-purchase, for it seems to be expressed in plain language and to the point. And to the owner about to part with goods on this system a useful hint is given for protection against a landlord.

*The Law relating to Electrical Energy in India.* By J. W. MEARES. Calcutta: Thacker, Spink & Co. 1910.—This is the Indian Electricity Act 1910 which, by sect. 58, repealed the Indian Electricity Act of 1893, and is now, therefore, the operative Act over the whole of British India, including British Baluchistan and the Santhal Parganas. The purpose of the work is a comprehensive one, for it is intended for the use of lawyers with only a limited knowledge of electrical engineering, and for electrical engineers whose knowledge of law is of about the same depth. The notes therefore are required to be numerous and clear, and a great amount of pains has evidently been taken with these by the eminent Author, for they seem to be of a fully explanatory character.

*An Analysis of Williams on the Law of Personal Property.* By A. M. WILSHERE. London: Sweet & Maxwell. 1911.—An analysis of a text-book is primarily a student's guide. Though most students make some sort of notes of the books which they read for their examinations, the number is certainly very small who compile a careful and systematic condensation such as this is. And a manuscript, however neatly kept, can never give the ease of reference which print affords. And, moreover, a book prepared for publication most likely undergoes such an amount of re-casting and verbal amendment as would deface a manuscript, and make it in great part illegible. And not least of the advantages of a printed book is that it has, generally, an Index. For all these reasons, this publication should meet with favour from the class for whom it is designed.

*Paterson's Practical Statutes 1910.* Edited by J. S. COTTON. London: Horace Cox. 1911.—This volume contains about thirty-eight Acts selected from those passed in the Session 1910, and well maintains the reputation which has been established by the long series. The greater part of the space is occupied by the Finance and the Licensing Acts and the introductions and notes which those popular statutes require. As some indication of the care bestowed by the Editor on his task, it may be mentioned that sect. 3 of the Development and Road Improvement Funds Act 1910, is a correction of a clerical error in the Act of 1909 to which he called attention in the *Practical Statutes* of the latter year. The list of local and personal Acts, which is as usual given in this issue, is of considerable practical value, as it may save time to anyone who wishes to consult a particular local Act.

*Supplement to the First Edition of Devonshire & Samuel's Duties on Land Values.* By GEO. H. DEVONSHIRE and F. SAMUEL. London: Stevens & Haynes. 1911.—This is a small but useful volume to be consulted in union with the principal work on the subject by the same Authors. It contains the forms and the rules issued by the Inland Revenue Commissioners since the principal work was published, and the amending sections of the Revenue Act of the present year. The work throughout bears evidence of close thought. A suggested interpretation of rule 3, with an ingenious diagram, by which is exhibited the conjectural events which might arise under the interpretation, will tend much towards unravelling the perplexing question.

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*Analysis of the Law of Insurance.* By D. H. J. HARTLEY, M.A. London: Stevens & Haynes. 1911.—Mr. Hartley, who is one of the lecturers on law to the London County Council, has prepared this book to assist students to get a general idea of the law and principles of insurance as a preliminary to the study of the larger standard works. Each chapter deals with a special point such as "the contract," "insurable interest," "the risk," and the leading cases under each heading, together with the points they decide, are grouped together at the end of the chapter. One chapter deals with "the Companies" and their constitution. One would have expected to find, there or elsewhere, some mention of Lloyds', the most ancient and, probably, now the largest organisation of insurers in

London. The Table of Statutes would be more useful if the complete citation was given in each case instead of the varying methods adopted, by which we find some of the lesser-known statutes fully identified, *e.g.*, The Customs Annuity and Benevolent Fund Assurance Act (56 Geo. III, c. 73), while the Friendly Societies Acts and the Marine Insurance Act are merely identified by the year. On the whole, however, the book should prove of value to students, both legal and commercial, who desire to get a general knowledge of the subject, whether they pass on to a study of the more detailed text-books or not.

*Voluntary Liquidation.* By J. P. EARNSHAW. London: Jordan & Sons. 1911.—This book forms another of those dealing with different phases of the law of companies which Messrs. Jordan publish, and although called a hand-book for liquidators, it will be found of great use to anyone concerned with the winding-up of a company voluntarily. As the Author points out, some 90 per cent. of windings-up are carried through voluntarily, and with this book before him the layman, be he liquidator, secretary or director, should be able to see that the requirements of the law are complied with. The book contains chapters dealing in sufficient detail with each stage of the process, as well as a summary statement of the necessary steps that should enable anyone to ensure that none are omitted. All the necessary forms are inserted, and the Bankruptcy Rules applicable will be found printed as an Appendix. For the relative sections of the Companies Act it is necessary to refer to the text, where they are clearly distinguishable by difference of type; it is difficult, however, to find any particular section, and it would probably add to the use of the book if the sections were printed as an Appendix, or at any rate a table showing the page at which they are to be found included in the volume.

*Six Roman Laws.* Translated, with Introduction and Notes. By E. G. HARDY, D. Litt. Oxford: The Clarendon Press. 1911.—The six laws treated are the *Acilia Repetundarum*, *Agraria*, *Antonia de Termessibus Majoribus*, *Municipii Tarentini*, *Rubria de Gallia Cisalpina*, *Julia Municipalis*, all to be found in Bruns. They cover the period from B.C. 122 to B.C. 45. The most interesting of the introductions and notes is probably that on the *Lex Julia*. In this and other parts of the work the Author sometimes crosses swords

with the Master of Balliol. The work, though slight, is a type of the best Oxford scholarship, and will probably be very helpful to students of the earlier Roman law, to whom the crabbed Latin, the technical terms, and the numerous *lacune* must present many difficulties.

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**Second Edition.** *Real Property.* By A. F. TOPHAM, LL.M. London: Butterworth & Co. 1911.—This book appears to us to be quite adequate to the modest ambitions entertained by the Author in his Preface. Indeed, we think that others besides students may find it of use. The book is divided into Parts dealing severally with Corporeal Hereditaments, Alienation, and Incorporeal Hereditaments. There is also an Introduction setting out the meaning of terms, while the usual Tables of Statutes and Cases will be found. The work is, so far as we can judge, well and clearly done. A serviceable addition are the Test Questions at the end, which supply the student with an excellent method of testing his grasp of the book. We do not wish to be hypercritical, but the division into chapters and sections strikes us as somewhat vague. Thus Chapter I has but one section. The Table of Contents, we think, is also capable of some improvement.

## CONTEMPORARY FOREIGN LITERATURE.

*La Reconnaissance dans le Droit Anglais.* By Dr. A. PAULIAN. Paris: 1911.—This is an extremely favourable example of those studies in English law which are now becoming frequent among jurists of the Continent. The work would be creditable to any English text-writer of the highest position. It is both historical and practical, and the learned Author wields his authorities with the utmost insight and accuracy. He understands the Statutes and Cases thoroughly. The Statutes begin as far back as the Laws of Edgar regarding the borh. Besides the Table of Cases there are several Appendices dealing with Criminal Statistics.

*Le Code Civil Général Autrichien: son Origine et son Développement à l'Occasion de son Centenaire.* By Prof. EMMANUEL TILSCH. Brussels. 1911.—A sketch of Codes since the Codex Theresianus

of 1766, containing 7,377 sections, and framed mainly by Azzoni, Professor of *praxis bohémica* at Prague. The Code of 1811 is much less prolix. It contains only 1,502 sections, and is founded partly on the *Usus Modernus*, partly on local custom. For it, Zeiller, a native of Graz, was chiefly responsible.

*Le Notariat en Egypte.* By Dr. VLADIMIRO PAPPALAVA, with an Introduction by AHMED CHAIK PASHA. Paris. 1911.—Apparently a complete account of the office of Notary in Egypt. One finds that the Notariat depends entirely upon legislation, and is not a historical growth like that of England.

*Il Diritto di togliere del Possessore e il Diritto di far togliere del Proprietario.* By Prof. M. RICCI-BARBERIS. Palermo. 1910.—This is a comparative study of the varying rights well known to students of Roman law, which appear in the first title of the second book of the *Institutes*, regarding the building on another's land. This includes a consideration of removal of fixtures, and the one English authority quoted is Amos and Ferard.

JAMES WILLIAMS.

Books received, reviews of which have been held over owing to want of space:—Halsbury's *Laws of England*, Vol. XVI, Mortimer's *Law and Practice of the Probate Division*; Leake on *Contracts*; Rastorgoueff, *Legal Position of English Companies in Russia*; Heywood and Massey's *Jamacy Practice*; Phipson's *Law of Evidence*; Mead and Bodkin's *The Criminal Law Amendment Act*; Rowsell and Moran's *Guide to the Law of Betting*.

Other Publications received:—Page and Finlay, *The Shops Bill 1911* (Stevens & Sons); Kim's *International Law Directory 1911* (Butterworth & Co.); *Encyclopedia of the Laws of England—Supplement 1911* (Sweet & Maxwell); *Butterworths' Workmen's Compensation Cases—Quarterly advance sheets, Part II*; Shearwood's *Bar Examination Questions, Vol. I, Part II*.

The *Law Magazine and Review* receives on exchanges with the following amongst other publications:—*Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer (India)*, *South African Law Journal*.

# THE LAW MAGAZINE AND REVIEW.

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## I.—SOME CHARACTERISTICS OF ENGLISH CRIMINAL LAW AND PROCEDURE.

A few years ago an eminent English writer championed the cause of one who had been wrongfully convicted and sentenced to a term of penal servitude for a crime he had not committed, and who had thereby suffered perhaps the greatest wrong it is possible for a human being to suffer. I allude, of course, to Mr. George R. Sims, whose powerful advocacy of the cause of Mr. Adolf Beck not only resulted in the establishment of his innocence, but also contributed not a little to the establishment of the Court of Criminal Appeal.<sup>1</sup>

Mr. Sims' action in this respect finds a parallel only in that of M. Zola in respect of the unfortunate Major Dreyfus in France a little earlier.<sup>2</sup>

Both Mr. Beck and Major Dreyfus were the victims of various systems and misguided official and professional prejudices, to use no harsher terms. Both were fortunate in attracting the attention and engaging the sympathies of two eminent literary men, who were neither lawyers nor soldiers and who, therefore, were able to view the matters in question from the impartial standpoint of outsiders. They became convinced of the innocence of their respective *protégés*, and accordingly they brought to bear

<sup>1</sup> See *The Martyrdom of Adolph Beck*. 1904.

<sup>2</sup> See *The Tragedy of Dreyfus*, by the late G. W. Stevens, 1899.



on their behalf clear thinking, great powers of expression and the greatest moral courage, with the result that these innocent victims, after much suffering, were cleared of the charges made against them, and as far as possible in the circumstances received reparation.

To both these eminent writers, Mr. Sims and the late M. Zola, the English and French nations respectively, and humanity at large, owe a deep debt of gratitude for their unselfish devotion to the cause of justice and their defence of the weak and the oppressed.

But Mr. Sims has recently returned to the charge, and in the case of Mary Ann Nash, known as the Wiltshire Well Mystery, he has not only, a second time, performed a signal public service in the interests of justice and humanity, but he has, as the result of that case, formulated what he calls a strong "Indictment of Crown Methods" in England. In an article entitled "Justice and Crime," which appeared in the *Daily Chronicle* of July 7th, 1911, Mr. Sims says:—

"There is a probability now that the stress of anxiety as to the woman's fate is over the methods pursued by the Crown in obtaining her conviction will be forgotten.

"As these methods illustrate in a very marked manner the grave perils of the new system of criminal procedure which is rapidly taking the place of the old, it is well that the public should be asked seriously to consider the direction in which we are drifting.

"It has always been our proud boast that in this country the accused person is to be considered innocent until his or her guilt has been proved. That is the British system of justice. To-day we are rapidly adopting the French system.

"The onus of proof in criminal procedure does not now absolutely rest upon the Crown. It is for the prisoner to establish his or her innocence. That is a grave danger, but there is a danger which is even greater, and that is the

attitude of the Crown with regard to an accused person. This is so strongly illustrated in the Wilts Well case that certain acts of the prosecution demand the serious consideration of the public."

Mr. Sims then proceeds to deal with the special facts and circumstances of that particular case, into which there is no need to follow him. They were, no doubt, put in his own cogent way and had their effect upon the mind of the Home Secretary in inducing him to grant a reprieve. But if these charges are true, they do undoubtedly constitute a very grave public danger. Without, however, enquiring into the truth or otherwise of the charges in this particular case, we propose to deal with them in a general way. We assume that most of our readers are already acquainted with the British (or rather English) system of administering justice in criminal matters. What, then, is the French system which Mr. Sims fears we are in danger of adopting? We propose to give a short sketch of this system, which in its main features is common to most Continental countries, and may therefore be described as the Continental system as opposed to the English, and also to touch upon certain aspects of the law of evidence and some other matters closely connected with the two systems.

*A Short Comparison of English and Continental  
Criminal Procedure. •*

Perhaps nothing flatters an Englishman's national pride, and contributes to his self-complacency, so much as a comparison between the English and Continental methods of procedure in regard to crime. At the same time, it is not well to adopt a pharasaical attitude and forget the essential differences in the temperaments of different nations, as well as their political and legal histories. Procedure which in one country would be regarded as repugnant to every sound principle of administration passes with indifference in

## SOME CHARACTERISTICS OF ENGLISH

another, by reason of custom, habit, and different ideas of law and government. Notwithstanding this, we venture to think that we may take a pardonable pride in our own system, if only on account of its purity of administration and the spirit of fairness which has hitherto, with few exceptions, pervaded it.

To the ordinary Englishman a French criminal trial appears to begin thus:—

President (addressing the prisoner): "Now, you guilty rascal, why did you do it?"

Prisoner: "I love my mother, and will not hear you insult her son."

And so they go on, with violence, emotion, and sensation, until one or the other is exhausted, and the Court adjourns to enable them to recuperate their shattered nervous forces. Every fact, however irrelevant, every little detail of the prisoner's life, however long past, every word and act of his that can be ascertained, is remembered and brought up against him as a lever to play upon the feelings of the jury, and show them what a dangerous sort of creature the prisoner is, and therefore, how likely he is to have committed the crime with which he is charged. Every rule of evidence dear to the heart of an English lawyer, is violated. Hearsay evidence to the fourth or fifth degree is admitted. The prisoner is "interrogated" both publicly and privately. The whole crime is "reconstructed" and re-enacted, as far as possible, by the police and the *juge d'instruction*, whose duty it is to get up the case against the prisoner and secure a conviction at all costs. The prisoner is "confronted" with the witnesses, and if there are more than one prisoner, they are "confronted" with each other. The sole object of all these proceedings is to do that which is the last thing English law permits to be done, viz., to extort from the prisoner a confession. English law, on the other hand, takes every precaution possible to prevent a

prisoner from being entrapped into or compelled to make a confession, and no confession is received in evidence unless it is proved to have been made quite voluntarily. The French idea is derived from the Roman and Canon law of the Middle Ages, under which it was thought wrong to punish a criminal until he had made a confession. This difference of view is the basis of the difference between the two systems. As Sir J. Fitzjames Stephen has so well pointed out in his *General View of the Criminal Law*, the English system is *litigious*, the French and Continental system generally, is *inquisitorial*. The French criminal trial has never developed beyond our Coroner's Inquest. In England a criminal trial partakes very much of the nature of a civil action. The conduct of the proceedings (except in those comparatively few cases which are taken up by the Director of Public Prosecutions) is left in the hands of the injured party or of an inferior police official. The proceedings are entitled *Rex (on the prosecution of A. B.) v. J. S.*; just as civil proceedings are entitled *Smith v. Brown*; and though theoretically the Crown is the nominal prosecutor, it does not interfere until the prisoner is found guilty and convicted, when it takes him over for the purpose of punishment. Up to that point the prosecution is a game or legal duel, between the prosecutor and the prisoner, in which the judge is present merely to act as referee and see fair play, the jurors being in fact the judges. As Sir Thomas Smith says, it is they who give the "deadlie stroke." On the other hand, in France, the proceedings are entitled *L'affaire Lesnier, Dreyfus, Steinheil*, etc.; and the proceedings from beginning to end, when once suspicion has attached to a prisoner and he has been arrested, are conducted by the *Procureur de la République*, or Public Prosecutor, with his subordinate *juges d'instruction*, assisted at the trial by the presiding judge. The injured party is present simply as a third party, a mere spectator, the *partie civile*. In fact,

while in England it is for the prosecution to prove strictly the prisoner's guilt, and every prisoner is presumed to be innocent until he is proved guilty, Continental procedure is based upon the contrary presumption, that the prisoner is guilty and it is for him to prove his innocence. The burden of proof is on the prisoner, not on the prosecution. It is only fair to say that the prisoner and his counsel naturally adopt the same methods as the prosecution. Every argument of whatever kind, every form of vituperation, every appeal to prejudice, sentiment and emotion, moral, social or political, is used to play upon the feelings of the jury, and to induce them, if possible, to return a verdict of guilty "with extenuating circumstances," if not an absolute acquittal.

From what is said above it will be seen that there is a jury in France, as there is now in most other countries of Europe. The jury was introduced into France by Napoleon I, who was a warm admirer of some English institutions, and it was afterwards copied by other countries. The jury on the Continent, however, is an exotic, and is employed only in criminal cases. The jurors (*messieurs les jurés*) give their verdict by a majority, as in Scotland; and it is always open to them to find the prisoner guilty but "with extenuating circumstances," the effect of which is, to mitigate the penalty, *e.g.*, it takes away capital punishment in cases of murder. There is also in France a body which corresponds roughly to our Grand Jury, *viz.*: *la chambre des mises en accusation*.

In the work above alluded to, published in 1863, Sir J. Fitzjames Stephen has given such full accounts, almost reports, of three typical French trials, *viz.*: the case of the Monk Léotade, the Affair St. Cyr, and the case of François Lesnier, that it is unnecessary to go over the same ground again, and do badly what he has done so well; but judging from recent cases, French procedure has made but little

advance during the last fifty years. The recent case of Mme. Steinheil appears, however, to have drawn public attention in France strongly to the question and the need for a better system.

We may, however, give just one or two examples of scenes from recent Continental trials, taken from reports which appeared in English newspapers. The first is from the trial of Mrs. Gould in September 1907, at Monte Carlo, where the procedure is substantially French:—

“‘I warn you,’ began the judge, fixing her keenly with blue eyes, and speaking in severe tones, ‘I have had enough of comedy. I will stand no further display of acting, no pretence of fainting. If you begin that game again, I will keep you here till midnight.’

“Mrs. Gould’s massive lips twisted like a snarling dog’s, but she repressed her rage and made a bid for sympathy. ‘Are you not yet tired of torturing a poor helpless woman?’ she said. ‘Have you no pity for me.’

“‘No,’ thundered the judge, ‘none. Did you have pity on Mme. Levin when you plunged the dagger into her breast? Did you have pity on her as you dismembered her corpse? Did you have pity on her when you insulted her memory? I have the same pity for you that you had for Mme. Levin.’”

The other little scene is from the trial of the Countess Tarnovska at Venice, in March, 1910:—

“On the resumption of the Kamarovsky murder trial here this morning, the President continued his merciless examination of the Countess Tarnovska. . . .

“‘But what about Naumoff?’ persisted the judge relentlessly. The Countess lowered her head and was silent. ‘Let me read you some of his letters,’ continued her inquisitor.”

“Merciless,” “relentlessly,” and “inquisitor,” are words that could find no place in a report of an English criminal trial. A Continental criminal trial consists of a series of

such dramatic incidents; an English criminal trial consists of one long, dull and dignified but careful investigation of facts.

The trial of the Cammorists now going on at Viterbo reads to us more like a long drawn out comic-melodrama than anything else.

The following description, from the graphic pen of Mr. G. W. Stevens, speaks for itself:—

"Here is an example of French methods of evidence. The officer who was with Dreyfus on the day of his degradation, Captain Lebrun-Renault, has asserted that the condemned man made a confession. A confession, of course, is evidence everywhere, but everybody knows that false confessions of crime are not rare; therefore, in English law even a confession requires confirmation. In this case the confession is disputed.

"It is not pretended that anybody else now alive heard Dreyfus. Yet almost every witness up to now had discussed this alleged confession. First the President questioned Dreyfus himself on it. Dreyfus denied it. Next, M. Casimir-Perier deposed that Captain Lebrun-Renault had said nothing about the matter to him. Next, General Mercier deposed that he told Captain Lebrun-Renault to tell M. Casimir-Perier about it. Next, these two witnesses were heard in contradiction. The ex-Minister of War said that General Gonse heard him tell the captain to tell the President; the ex-President said that M. Dupuy had told him that Captain Lebrun-Renault did not tell him, Dupuy, that he told him, Casimir-Perier. M. Cavaignac went into the same incident at great length. He said that General Gonse wrote to him that Captain Lebrun-Renault told him, Gonse, that he, Lebrun-Renault, heard Dreyfus confess. *This jungle of pronouns is what the French seem to call evidence.* And when you have struggled through it you hear that Captain Lebrun-Renault is to be called himself to give his

own evidence in Dreyfus's presence! What a trial!" (*The Tragedy of Dreyfus*, p. 94.)

"However, Lebrun-Renault's statement was not all. He said that there was also in the room at the time a Captain d'Attel, who is now dead. So next, in the French manner, we had a captain to swear that d'Attel told him he heard Dreyfus confess, and then a lieutenant-colonel to swear that Lebrun-Renault told him he had heard Dreyfus confess, and then a major to swear that the captain had told him that d'Attel had told him that Dreyfus had confessed, and then a first-class controller to swear that the lieutenant-colonel had told him that Dreyfus had confessed." (*Ib.*, pp. 231-2.)

No wonder if the writer, who had heard this "evidence" given merely as a spectator, fully expected to be called as a witness himself.

"I was waiting to hear myself called on to swear that I had heard the controller tell the Court that the lieutenant-colonel told him Lebrun-Renault told him Dreyfus had told him he delivered documents—when I heard General Gonse admitting that when challenged by Dreyfus he said nothing about the alleged confession." (*Ib.*, 232.)

"What would an English judge say to such a confession?"

"You do not need me to tell you. The English judge would refuse to hear another word of it. But the French, in perfect good faith, look at confessions in quite a different way. Our justice aims at proving a man did a thing; that of France at inducing him to say he did it. The whole duty of a *juge d'instruction*—all the browbeating which is volleyed from the bench at a French prisoner, and which seems to us so contrary to the spirit of justice—is founded on the theory that the best, even the only satisfactory, proof of guilt is the confession of the accused. 'Has he confessed?' is the Frenchman's first question when he hears a man is arrested. And, having been brought up in the belief that confession is the first duty of a criminal, he usually has." (*Ib.*, p. 228.)



The effect of such evidence, as Mr. Stevens points out, is utterly confusing and nugatory. "Listening hour by hour, day by day, to testimony such as this finished by quite numbing the judgment." Add to this that the witnesses for the prosecution and witnesses for the defence are not called in due order, but are all called indiscriminately, "in alternate layers of for and against," sandwiched in between so to say—indeed the terms witnesses for the prosecution or for the defence can hardly be applied to them with propriety—they are all witnesses, and it is for the jury to estimate the effect of their evidence; and that they give their evidence as they think fit, in narrative form, without check, and not in answer to questions, and it will be seen how vastly the French method of procedure differs from ours. "Every French witness," says Mr. Stevens, "thinks it grossly unfair if he is not allowed to say anything he likes about anything." Further, all cross-examination must be conducted through the presiding judge. The result is, from our point of view, a "hopeless maze of discrepancy and contradiction, which makes you despair of human certitude and human veracity."

A criminal trial is one of the things they do *not* "manage better in France."

*The English Law of Evidence as applied to Criminal Matters.*

It would be out of place, even if it were possible, to attempt to give here anything like a complete account of the English Law of Evidence; but there are a few rules which relate specially to the administration of the Criminal law and which demand a passing notice.

Although the Law of Evidence appears very bulky in our law books, it really depends upon the application of comparatively few principles. Its bulk is due to the fact that it is implicated with Case law and pleading, and is

so treated by most text-book writers. It is derived from two sources :—

(1) A very large number of cases, most of which have been decided within the last 250 years : and

(2) A comparatively small number of Acts of Parliament, most of which have been passed within the last 50 or 60 years.

From this it will be seen that the Law of Evidence is almost entirely the result or product of judge-made law, and indeed it was only about sixty years ago that the Legislature began to regulate it by Act of Parliament. It is therefore of comparatively modern origin, and few, if any of its rules date back before the Commonwealth. It shares with the Law of Contract the credit of being our most modern and typically English branch of law. It forms part and parcel of the jury system from which it cannot be separated. Also it owes much to the science of logic. Chief Baron Gilbert's treatise on Evidence, the first separate work on the subject, was based on Locke's *Essay on the Human Understanding*, as Mr. Justice Stephen's *Digest of the Law of Evidence* was based on J. S. Mill's *Logic*. Hence the importance of the study of logic to a law student.

In his *General View of the Criminal Law* (p. 69), Mr. Justice Stephen declared that the rules as to the competency of evidence in criminal cases might "be reduced to a few leading maxims, the most important of which are :—

"(1) Evidence must be confined to the point at issue :

"(2) The best evidence must be given, or its absence explained :

"(3) Hearsay is not competent evidence :

"(4) No one is obliged to criminate himself."

Each of these maxims requires some explanation or limitation.

The first opens up the whole question of relevancy.

The standard of legal relevance, particularly in criminal cases, is a very strict one. If the question at issue is how a man acted on one particular occasion, evidence of the way in which he acted on some other similar occasion is not generally admissible, though in ordinary life this would be considered as sufficient. The effect of this rule is that (with some exceptions) evidence of the prisoner's past offences (if any) is excluded until after the jury has given its verdict, when it is admitted only to guide the judge in passing sentence. A man, it is said, must be tried upon the evidence and that alone, not upon his character or reputation.

The exceptions to this rule resolve themselves into cases the facts of which show a systematic course of conduct, e.g., the habitual receipt of stolen property, or practice of some particular form of fraud, &c. See *Rex v. Ball* (L. R. [1911], A. C. 47.)

As to the second maxim, it has now sunk to an altogether secondary and subordinate position, and is in practice limited to cases of documentary evidence. In such cases the original document must, if possible, be produced in Court; and a copy will not be admitted in evidence unless it is proved that the original has been destroyed or is in the possession of the other side, who will not produce it after notice to do so. At the same time there is no doubt that this maxim was one of the earliest and fundamental ideas underlying the law of evidence, and though it has now lost its original importance, it has profoundly influenced this branch of the law. Throughout the history of the Law of Evidence we see a struggle constantly going on between the principle embodied in this maxim and an opposite, competing principle, viz. the desire to save the time of the Court. The present Law of Evidence is largely the resultant of this struggle.

The rule as to hearsay is obviously based on the desire

to get the best evidence. The evidence must be that of an actual, percipient witness, not gathered at second hand. To this rule, of course, there are many exceptions.

The last of the four maxims is really not so much a rule of evidence in itself, as a great principle of our law based on common fairness. With it may be bracketed a similar maxim, that no man shall be condemned without being heard in his defence.

One sometimes sees in text-books a heading, *Rules of Evidence peculiar to Criminal Law*. This distinction is somewhat misleading. In *Rex v. Burdett* (4 B. & Ald. 122), in 1820, Mr. Justice Best said: "It has been solemnly decided that there is no difference between the rules of evidence in civil and criminal cases." And in *Leach v. Simpson* (5 M. & W. 312), in 1839, Mr. Baron Parke said: "The rules of evidence must be the same in civil as in criminal cases." In *Rex v. Ball* (q. v. s.) similar principles were admitted in argument. What, then, is the meaning of the apparent contradiction implied in the phrase, "*Rules of Evidence peculiar to Criminal Cases*"? The explanation is this. The difference is one of degree, not of kind. In Criminal law a distinction must be drawn between what is "evidence to be heard" and what is "evidence to convict"; or, in other words, between the *admissibility* of evidence and the *weight* of evidence. So far as the former is concerned, there is no difference between the rules of evidence in civil and criminal cases; but so far as the latter is concerned, there is a very considerable difference. Perhaps the best way of putting it is to say that the rules of evidence peculiar to criminal cases are not different from, but are supplemental to, those in civil cases. The reason for this is obvious. English law attaches no great importance to the preservation of life and liberty, that the rules of evidence are applied much more strictly in criminal than in civil cases.

Thus the first rule of evidence is that the burden of proof is on the party who asserts or affirms, not on him who denies; but in criminal cases the prosecution is sometimes called on to prove negative averments — *e.g.*, in false pretences. In addition to this, however, a much stronger degree of proof is necessary in order to obtain a conviction for a crime than to obtain a verdict in a civil case. In *Cooper v. Slade* (6 H. L. Cas. 772), in 1858, Mr. Justice Willes said: "In civil cases, the preponderance of probability may constitute sufficient ground for a verdict." But in *Reg. v. White* (4 F. & F. 384), in 1865, Mr. Baron Martin, in summing up a criminal case to a jury, said that in order "to enable them to return a verdict against the prisoner, they must be satisfied beyond reasonable doubt of his guilt. And this as a conviction, created in their minds, and not merely as a matter of probability; and if it was only an impression of probability, their duty was to acquit." Everybody who is in the habit of attending criminal Courts has heard similar language from both judges and counsel on many occasions. The direction that the jury must be satisfied "beyond reasonable doubt" is a somewhat vague and abstract one, but it is the only restriction which English law imposes upon juries in criminal cases. As to what constitutes a 'reasonable doubt,' it has been said in eloquent terms by a great Irish judge (Kendal-Bushe, C. J.): "To warrant an acquittal the doubt must be not light or capricious, such as timidity or passion prompts, and weakness or corruption readily adopts. It must be such a doubt as, upon a calm view of the whole evidence, a rational understanding will suggest to an honest heart; the conscientious hesitation of minds that are not influenced by party, preoccupied by prejudice, or subdued by fear."

Another safeguard which English law throws round the prisoner is to be found in the peculiar jealousy with which it regards confessions of guilt. It refuses to accept them

unless it is clearly shown that they were made perfectly voluntarily, and not induced by any threat or promise of a temporal advantage. On the other hand, it admits two classes of evidence which are rejected in civil matters. Contrary to the usual rule against hearsay evidence, it admits in cases of homicide what are known as "dying declarations," *i.e.*, declarations made by a deceased person as to the cause of his death, when he has abandoned all hope of living. Again, a "deposition" when taken with proper formalities before a magistrate is admissible at the trial of the accused, provided the person who made it is dead or there is no reasonable probability that such person will ever be able to travel or give evidence, the deposition purports to be signed by the justice before whom it was taken, and reasonable notice has been given to the person against whom it is to be used of the intention to take such deposition, and he or his counsel or solicitor had opportunity of being present when the deposition was taken and of cross-examining the person who made the deposition. But if the deponent is still alive and well, though not within the British Dominions, his depositions cannot be used. He must come and give evidence in person. No similar provision exists in civil cases if a witness has died or is too ill to travel, unless the evidence has been taken abroad under a Commission.

Reference has already been made to the strong presumption in favour of a prisoner's innocence, and the fact that the burden of proof rests on the prosecution. A prisoner, it has been said, is entitled "to maintain a sullen silence;" and if the evidence produced against him is so weak that no reasonable man could accept it as establishing his guilt, it is the duty of the judge not to allow the jury to find him guilty, without calling on the prisoner to make any reply. To this rule, however, there is one exception which comes into play very frequently. It is known as the

"doctrine of recent possession," though this, like many other elliptical, abbreviated expressions, is a misnomer. The full expression would be "the doctrine of possession of recently stolen property." Where a man is found in possession of property that has been very recently stolen, the law throws on him the obligation of showing how he became possessed of it, and unless he can give a reasonable account of the way in which it came into his possession, he is deemed to have stolen it. This, we believe, is the only instance in English law where the burden of proving his innocence rests on the prisoner. The rule is one of obvious convenience and necessity, and one of the very oldest rules of English law. It was known and acted on in Saxon times; though it has been said in modern times that it is not a rule of law at all, but only a presumption. Be that as it may, it is a very convenient and useful rule of practice, which is applied with great frequency and fairness, as an innocent man has nothing to fear from it, and it is rapidly hardening into a rule of law proper.

It is very curious to notice how the old prejudice against what used to be called "circumstantial evidence" has now almost completely died out. It was never anything but a dyslogistic expression, an advocate's mode of speaking contemptuously of his opponent's case. All evidence which is not direct and positive is circumstantial. In ninety per cent. of the cases which come before the criminal Courts nothing but circumstantial evidence is possible; and if it were not admitted most crimes would go unpunished. When a criminal meditates a crime he does not as a rule publish his intention from the house-tops. Secrecy is the very essence of criminality. Indeed, nothing is more surprising than the small accidents by which crimes are discovered; a button or a finger print frequently leads to detection.

*(To be continued.)*

## II.—THE LAW OF BANKRUPTCY.

A history of the law of Bankruptcy, and the causes which led to its institution and its alteration from time to time might be interesting, but would be of little importance. The general principles are pretty well established, though not perhaps very carefully defined. If any one thinks that they unduly restrict the powers of the creditors, I reply that the only right which any creditor has of seizing the person or property of his debtor is the right which the law confers on him; and as the public good ought to be the main object of the Legislature, no creditor ought to be allowed to possess this power unless it is for the public good that he should possess it. The debt may remain as a moral obligation, but the creditor may have no just claim to the assistance of the State in recovering it. This is the principle of the Statute of Limitations. It does not extinguish the debt after the lapse of a certain time, but it refuses to let the creditor set the law in motion to recover it when this period has elapsed.

The principle is I think acknowledged, that when a man shows by his conduct or his admission that he is unable or unwilling to pay his debts as they become due, the State is justified in laying hold of his property, and in realising it and dividing it on equitable principles among the creditors, instead of leaving each creditor to try to be the first to lay hold of enough of the assets to pay his own debt in full, to the detriment of the others. A scramble, on the principle of "first come first served," is very undesirable, and is also in most instances very wasteful to the estate. The principle of taking possession of the estate and stopping all actions at the suit of individual creditors is a sound one; and, as a rule, an attempt on the part of a particular creditor to obtain an advantage over the others should be regarded, not as a



reason for treating him with special favour on account of his "*superior vigilance*," but for according him no preference of any kind over the rest.

It sometimes happens that the debtor or his friends, when he is thus driven into a Bankruptcy Court, make an offer to the creditors to pay a composition in full discharge of his debts, the debtor being allowed to carry on the business and retain his assets, instead of having them sold or otherwise realised by the State. If all the creditors accept this offer, they ought under all ordinary circumstances to be permitted to do so; but the present law enables a sufficient majority of them to accept the proposal and render it binding on the dissentient minority. To this course, likewise, I think no objection can be made on principle. But some investigation is often required in order to find out whether the offer is a reasonable one. This investigation should, I apprehend, be made by an officer of the Court to whom this duty was entrusted, and the result of his inquiries should be transmitted to the creditors before any vote on the composition is taken. The debtor should, of course, furnish a sworn list of his creditors, with the amounts due to each, as well as a full statement of his assets—any serious error in either of which might lead to the composition being set aside. The more usual case, however, is a realisation of the estate.

As regards this realisation, the first question which arises is, whether this duty should be entrusted to an officer of the Court or to a person who has been nominated by the creditors (in England by the official receiver, or by a trustee nominated by the creditors at a meeting held for the purpose)? The law on this subject ought, I think, to be elastic. Large estates, as a rule, can be best realised by a trustee under the control of the Court and bound to account to it. Small estates, as a rule, can be best realised by an official. Delay in realising usually costs something. Expense is also incurred in calling meetings of creditors.

Creditors are perhaps put to trouble and inconvenience in attending the meetings and proving their debts, when there is no prospect of a dividend, and debts may at such meetings be admitted too hastily and without proper investigation. In Ireland, though the statute allows the creditors to appoint a trustee, this power is hardly ever acted on. But there the law permits the appointment of a creditors' assignee, in whom the bankrupt's estate is vested jointly with the official assignee, though the money produced by the realisation of the estate is received by the official assignee only. This system, however, has also proved unsatisfactory in dealing with small estates. The realisation of the estate is usually deferred until the official assignee has a creditors' assignee to assist him. This occasions delay and expense; and when the day for appointing a creditors' assignee comes, either no assignee is nominated (in which case the appointment is sometimes adjourned, thus causing further delay and expense), or his debt is so small that he has practically no interest in the matter, and leaves it entirely in the hands of his solicitor. Small estates would, I think, be best realised by an officer of the Court, assisted by an official solicitor where the services of a solicitor are required—for there are many cases in which, so far as realisation is concerned, no solicitor is needed. Large estates should, as already suggested, be realised by a trustee under the control of the Court, but the rules for controlling him should not be too strict, and should chiefly aim at preventing delay in realisation and distribution. His account should be audited by some well-qualified person, whether an officer of the Court or of the Board of Trade. Where the official receiver, or official assignee (in Ireland), realises the estate, I think the audit of his accounts should be entrusted to an official of the Board of Trade.

For a speedy and complete realisation of the estate, all persons who had dealings with the bankrupt should be

bound to supply to the person to whom the realisation is entrusted, all proper information as to the estate and the charges on it (the Court dealing with any trouble or expense that he might be put to). Thus a mortgagee should be bound to state (if so required) the particulars of the mortgage and the sum which he claimed as due on foot of it: and any person who had a contract with the bankrupt which had not been completed at the date of the bankruptcy, should be required at once to give notice to the person in whom the estate was vested, so as to enable the latter to decide whether he would proceed with the contract or disclaim it. A solicitor who has a lien for costs on any title-deeds, &c., should for a similar reason be required to furnish his bill of costs to the trustee or assignee, and the latter should in all proper cases be permitted to have the costs (or any other bill of costs) taxed without undertaking to pay in full the amount allowed on taxation, which would be usually inconsistent with the Bankruptcy Statutes. With an absconding bankrupt, or one who has filed no statement of affairs, the trustee or assignee has often great difficulty in discovering what the assets are as well as in realising them. He should have every facility for ascertaining this. A solicitor's lien on a deed affords no reason why the trustee should not have a copy of the deed and judge for himself as to its value. The administrator of an insolvent estate should not be required to buy a pig in a bag. A secured creditor has a right to sit on his security, as the phrase is, but this ought not to prevent the trustee from ascertaining all about the security, nor should he be restrained from selling the bankrupt's interest under the security however limited or qualified that interest might be. The bankrupt's interest may be worth something though he has not a good marketable title. And I do not think a secured creditor should be allowed to realise the security without notice to the trustee or official receiver.

So much for the realisation of the estate. Everything possible should be done to render it speedy, complete, and as inexpensive as the circumstances admit of, as well as to have the accounts vouched and the proceeds made available promptly. Next comes the distribution of the assets. The statutes here give a preference to some debts over others, but it is not always easy to ascertain what debts are entitled to this preference. In Ireland for instance, though not in England, Crown debts are deemed preferential, so that telephone rent will in future be a preferential debt in that country. No such distinction as this ought to exist, and as the essential principle of bankruptcy is equality, the list of preferential debts should be made as short as possible. There are, however, a number of other difficult questions which arise on proving debts in bankruptcy, such as the landlord's claim for rent leviable by distress and the preferential creditors' claim against the amount so levied, the claims of secured creditors, and of bill-discounters whose bills represent debts due to bankrupt, claims in respect of future debts, annuities, reversions, breaches of contract, guarantees, etc., including the postponed claim of the bankrupt's wife. The person who is best qualified to realise the estate may know little or nothing of such matters. He will very probably leave them in the hands of his solicitor who may run up a pretty large bill of costs with very little result. The admission of debts, in my opinion, ought not to be left to the trustee or even to the official receiver. Sittings for proof of debts should be held before an officer of the Court possessing a competent knowledge of bankruptcy law, whose duty should be not merely to decide on objections to proofs, but to see that no debt was admitted that was not proved to his satisfaction—giving the claimant an opportunity of amendment if the claim as originally furnished was defective. This is the ordinary practice in Ireland where the decision

of the officer—the chief registrar, chief clerk or registrar—is usually acquiesced in without any appeal to the judge. A list of the debts thus admitted should be at once placed on the file of the proceedings, and when the time comes for declaring a dividend, the dividend list should be prepared from the file, taking care to exclude duplicate admissions and to correct any obvious errors. When the estate is realised by a trustee this list might be forwarded to him for the purpose of striking a dividend on it; but I think it would be more satisfactory for the trustee to lodge in Court the amount found to be in his hands on the audit of his account, and for the Court to proceed to strike the dividend. The question of an allowance to the bankrupt is one into which I need not enter in detail, but I think the granting of it should (like the granting of the discharge or certificate) be left in the hands of the Court. The feelings which the largest creditors entertain towards the bankrupt are less reliable than the sentiments of an impartial judge. Some rules, however, might be laid down for the judge's guidance.

So much for the bankrupt's estate. I need hardly say that when the bankrupt remains in this country it is usually necessary for him to file a statement of affairs and attend for examination on oath in order to ascertain what his assets are. But his not doing this ought not to interfere with his discharge or prejudice him in any way if he has not the means of attending the examinations, and such means are not provided for him either out of the estate or out of the public revenue; or, if the statement of affairs is in a form which he cannot fill up without professional assistance for which he cannot pay. The Court should have power in proper cases to dispense with the examination or examinations of the bankrupt, and to direct the official receiver or other officer if necessary to send the bankrupt a simpler form of statement

of affairs which an ordinary man could fill up unaided. The examination of the bankrupt, however, is often held for a different purpose, and belongs to a different branch of bankruptcy from the realisation and distribution of the estate. For the law of bankruptcy is concerned with the bankrupt as well as with his estate; and it deals with the bankrupt in the interest of the public, not that of the creditors—for which reason I think the cost of all such dealings should be defrayed by the State, and not paid out of the bankrupt's estate to the detriment of his creditors. Sometimes his examinations, and those of other witnesses whose evidence is of no use to the creditors, lead to a criminal prosecution, the costs of both prosecution and defence being (at least in part) borne by the estate. More frequently the faults thus brought to light lead only to refusing or delaying the bankrupt's discharge. This may sometimes be of use to the creditors, but more frequently it is only of use to the public by maintaining what is called "commercial morality." The law at present lays hold, or rather professes to lay hold, not only of the property which the bankrupt possesses at the date of adjudication, but also of all property which comes to him before he obtains his discharge (or in Ireland his certificate). The refusal to grant, or delay in granting, his discharge, is a just punishment on a man who has been dishonest or reckless, or has shown himself entirely unfit for trading; but it is a punishment which ought not to be inflicted for mere non-compliance with some of the Rules of Court due to want of funds. If the discharge were only refused or delayed for misconduct on the part of the bankrupt, the public would be the chief gainer, though the creditors might chance to gain something by the capture of after-acquired property. But this capture of after-acquired property is not the only ill-consequence of being an undischarged bankrupt. He incurs several disabilities, and commits a criminal offence

if he obtains credit for more than a certain sum without disclosing the fact that he is an undischarged bankrupt. These provisions are made in the interest of the public, not of the creditors of the particular estate. Indeed, if one of the bankrupt's creditors were afterwards to give him credit for the requisite sum, most of us would think that he had nobody to blame but himself, and had no claim for relief. It is for the benefit of persons who had no previous dealings with the undischarged bankrupt that these laws are made, and therefore I think his creditors should not bear the expense incurred in relation to the application for discharge. The interpretation given by the judges to the present statute, however, makes the withholding of the discharge of less use to the creditors than the framers of the statute probably intended. Take the simple case of a legacy left to a bankrupt. If the testator died before the bankruptcy, but the executor had not yet paid the legacy, he can be compelled to pay it to the official receiver, notwithstanding that he subsequently paid to the legatee and was not aware of the bankruptcy at the time when he paid it. But supposing that the testator died after the bankruptcy and the executor pays the bankrupt before the official receiver intervenes, an action will not lie against the executor; and, if I interpret the decisions rightly, he cannot be made responsible even if he knew of the bankruptcy before making the payment and intentionally kept back the contents of the will from the official receiver. If any of the money remains in the hands of the bankrupt when the official receiver learns the facts he can recover it, but the object of the statute as interpreted by the judges seems to be not so much to capture the after-acquired property for the benefit of the creditors, as to punish the bankrupt by taking from him any part of it that he has not already spent. No man's after-acquired property should, I think, be captured in cases where he failed

to obtain his discharge merely on account of poverty or of some other cause for which he was not to blame. But the present law might be made more stringent with respect to a bankrupt who failed to obtain his discharge owing to misconduct. Persons who knew him to be an undischarged bankrupt should be made responsible for paying him money without obtaining the assent of the official receiver, and it might be desirable to have a register of undischarged bankrupts which any person could consult if he wished to inform himself on the subject. Whether, however, the undischarged bankrupt's after-acquired property should be liable to capture during his whole life is, I think, doubtful. I would suggest a ten years' limit. At present, moreover, the capture of after-acquired property sometimes injures innocent persons. Though the bankrupt has after-acquired property he has also after-acquired liabilities—perhaps of greater amount. If this property is seized for the benefit of the old creditors, the new ones will be defrauded. If the latter were ignorant of the previous bankruptcy they should, I think, have the first claim on the new assets, and if this were done the unreasonableness of paying the costs relating to the application for discharge out of the bankrupt's estate would more clearly appear.

The administration of an estate by a Court of Justice is often needlessly expensive owing to the bringing in of solicitors and counsel when there is no need for them; and I need hardly say that in the administration of insolvent estates there are special reasons for keeping down the expenditure as far as this is consistent with efficiency. But one item of expenditure is worthy of special consideration—the Court fees. A good deal of the work, as I have pointed out, is done in the interest of the public and should be paid for by the State, not out of the bankrupt's assets to the detriment of his creditors. And the fees should not be on a scale calculated to realise a profit to the State by reducing



dividends that will be small enough in any event. At present the fees, generally speaking, exclude working men and most people of the poorer class from taking advantage of the law of bankruptcy. So far as the realisation and distribution of the estate is concerned, nothing would be gained by making bankrupts of people who are unable to pay the necessary fees; but unfortunately, under the present law, it is often a very great hardship to a debtor to be unable to become bankrupt. One of the principal objects of the original Bankruptcy laws was to save the debtor from imprisonment for not being able to pay his debts in full. This protection from imprisonment is now given to all who can pay the necessary fees, unless the bankrupt has been guilty of some crime or offence against the Court which is punishable by imprisonment. Besides escaping imprisonment, moreover, he is allowed to retain some of his goods which might be seized and sold if he were not a bankrupt, and he can effect a binding composition with his creditors, provided that a sufficient majority of them accept it. He is allowed a small sum out of the estate, and if he has obtained his discharge his after-acquired property is protected. But if a debtor is unable to pay the fees and cannot therefore become bankrupt, he has no way of getting free from any debt save by payment in full; he has no way of protecting his after-acquired property; his goods remain liable to seizure and sale, and he is liable to be imprisoned for a limited period after a most unsatisfactory trial and on most unsatisfactory evidence as to his ability to pay a particular debt. Thousands of men are thus imprisoned every year. It seems clear that we ought to pursue one of the following three courses, viz.: (1) To abolish imprisonment for debt altogether, which is, I think, the most reasonable and proper course; (2) To allow bankrupts to be imprisoned for debt in the same way as other debtors, *e. g.*, if a bankrupt has had the means of paying a judgment-

debt since it was entered up and did not pay it, let him be imprisoned, notwithstanding that he cannot pay it now; or, (3) Allow every debtor who desires it, however poor he may be, to become a bankrupt and enjoy the privileges of bankruptcy as regards imprisonment, composition, excepted articles, and after-acquired property.

In one respect I think the present law is unduly hard on a fraudulent bankrupt. He is bound to answer all questions put to him relating to his dealings with his creditors or his estate, and may be imprisoned for contempt of Court if he refuses to do so. But it is not very unusual to find in this way that he has committed a criminal offence; and the answers which he has given under compulsion may be used against him on a prosecution which is sometimes directed or suggested by the judge. It should, I think, be provided that his answers to questions put to him in Court should not be used against him on a criminal trial—except, of course, a trial for perjury, based on the allegation that the answer in question was wilfully and materially untrue. This would leave all other grounds for prosecution open, but exclude his own admissions of the offence in answer to questions which the Court compelled him to answer.

I have touched on frauds by bankrupts, but I cannot leave the subject without calling attention to the distinction between two classes of frauds. A trust deed executed for the benefit of creditors involves no fraud in the ordinary sense of the term, but I think it is rightly declared to be void and an act of bankruptcy—and the law often uses the phrase “fraudulent and void” where the latter word alone would be sufficient. On the other hand, a trust deed in trust (however disguised) for the bankrupt himself, or for his wife or family, would be a real fraud, intended to deprive the creditors of the property that ought to be theirs. But, under the present law, persons to whom an insolvent man has assigned property which ought to have gone to his

creditors generally, are often permitted to retain what they have got, because the bankrupt did not fraudulently prefer them to other creditors, or even because they were not aware of any such preference. Now, I apprehend that where the object of the law is to divide an insolvent's assets equitably among his creditors, and the bankrupt has within a short time before his failure done something, which if it stands, will prevent this equitable distribution, the bankrupt's motives ought to be considered immaterial, and the transaction should be declared void. When the bankrupt comes to apply for his discharge it will be time enough to inquire what his motive was in thus making away with his property. Suppose, for example, that a short time before bankruptcy a trader who has been refused further credit sends an order for £50 of goods to a creditor, with a cheque for the money, and the creditor sends no goods and sets the £50 to the credit of the pre-existing debt. Here there is no fraudulent preference or fraudulent intent on the part of the debtor, nor can it be said that there has been fraud on the part of the creditor, unless he had previously promised to send goods if cash were supplied for them. But the transaction interferes with the proper distribution of an insolvent estate, and ought to be set aside as void. Again, the creditor who knows that his debtor is in difficulties often presses him hard, and ultimately induces the debtor to give him some security. Having yielded to pressure the debtor is held not to have been guilty of fraudulent preference. But if the transaction is upheld (as under the present law it usually is), it interferes with the equitable distribution of an insolvent estate, and probably the reason why the creditor was so pressing was that he knew (or at least strongly suspected) that the estate was insolvent. The bankrupt's motives seem to me to be in such cases altogether immaterial. If he were applying for his discharge they might be important, but

I fail to see that his motive ought to affect the realisation or distribution of his assets. Suppose he has a bill for £100 in which a friend has joined him as surety under discount in a bank. He lodges £100 in the bank to meet the bill, and his friend is never called on to pay it at all. His motive in lodging the money was not to benefit the bank; therefore there was no fraudulent preference to the bank. On the other hand, there was no fraudulent preference to the surety because he never paid the surety anything. But if, instead of lodging the £100 in a bank, he gave it to the surety after the latter had taken up the bill, it would probably be held to be a fraudulent preference. If he gave the surety £100 for the purpose of taking up the bill, I could not venture to say whether the transaction would be held to be valid or fraudulent. In all three cases it would equally interfere with the equitable distribution of the assets of an insolvent debtor, and in all three cases it should, in my opinion, be equally void. But as a man may continue in a state of insolvency for a considerable time before he becomes bankrupt, the transaction should only be invalidated if it took place a short time before the bankruptcy.

We should not be too hasty in setting down as fraud what may not be fraud at all. For instance, a trader orders goods and sends a cheque for the amount, which is dishonoured, and it is found that his bank account was largely overdrawn at the time. But it may turn out on inquiry that the overdraft was secured and that the debtor did not know, when he drew the cheque, that the bank was not willing to advance more money on foot of the security, and perhaps that the overdraft had stood at a higher figure on a previous occasion when his cheques were honoured.

To sum up the leading points, I think the present law does not make a sufficient distinction between our dealings with the bankrupt's property and our dealings with the

bankrupt himself, in which latter dealings the public and not the creditors are the interested parties and should bear the necessary expenditure. In consequence of our failure to make this distinction, honest bankrupts, whose assets are small, fail to obtain the full benefit of the Bankruptcy laws, as a discharge cannot be procured without money. For the same reason—smallness of assets—many honest debtors are entirely deprived of the benefit of the Bankruptcy laws, owing to their inability to pay the requisite fees, and these debtors remain liable not merely to seizure of their goods but imprisonment of their persons.<sup>1</sup> It is idle to say that these debtors are only imprisoned for dishonesty. It is not dishonest for an insolvent man having the means of paying a judgment-debt to leave it unpaid. On the contrary, if he paid it voluntarily, it might be held, in the event of a subsequent bankruptcy, to have been a fraudulent preference which might retard or prevent his discharge. And if it is for dishonesty that the debtor is imprisoned, why is he released on being adjudicated bankrupt, although his term has not expired and the debt remains unpaid? When the debtor has no tangible assets to be dealt with, all dealings with him should, I apprehend, be based on the public interest and not the interest of an individual creditor, who is usually trying to obtain an advantage over other creditors equally deserving of consideration. Lastly, I think the Court should keep the distribution of the bankrupt's estate in its own hands, although the realisation may often be entrusted with advantage to an outsider. That after the lapse of time that has occurred since our present Bankruptcy Statutes were passed, numerous amendments are desirable goes without saying, but I think it best to confine myself to broader issues which ought to be dealt with in one way or the other in the next Bankruptcy Bill.

LEX.

<sup>1</sup> An Administration Order in England is a very partial and inadequate remedy for this evil.

### III.—THE TRIAL OF ALICE LISLE.

ONE of the most interesting episodes in the history of the seventeenth century, in England, was the Protestant rebellion, under the Duke of Monmouth. In 1685, the Duke, who was an illegitimate son of King Charles the Second, or at all events (for there is some doubt about it) was accepted as such by Charles, placed himself at the head of the Protestants of the western counties, and raised the standard of revolt against the Popish monarch, James the Second. The rising was doomed to failure from the commencement and, after a brief and ill-managed campaign, "the Protestant Duke," as he was called, was defeated at Sedgemoor. A few days afterwards he was captured hiding among the ferns and brambles in the moorland county north of Wimborne, with his pockets full of dried peas and in the last stage of exhaustion. He paid the penalty of his rashness with his life, and was beheaded on Tower Hill.

After the suppression of the rebellion, Lord Chief Justice Jeffreys was sent down, with other judges, to try those who had been guilty of participation in the revolt. His methods were so violent and brutal that his name has been a synonym for cruelty ever since. The most appalling miscarriages of justice took place, and the "Bloody Assizes" sent many an innocent man to his doom. The conduct of Jeffreys was so horrible that one cannot help feeling that there must be some truth in the explanation which is sometimes given, that his mind was to some extent unhinged by his habitual intemperance, and by attacks of the stone, to which he was a martyr.

Of all the trials which he presided over the most brutal and shocking was that of Alice Lisle. The manner in which he hounded this aged lady of quality to death reveals the judge in his blackest colours. She was the widow of John

Lisle, who had been one of the judges of Charles the First, and who, during the Protectorate of Cromwell, had been Lord President of the High Court of Justice. She therefore started with a prejudice against her. She was charged with having, after the battle of Sedgemoor, harboured in her house one John Hicks, a nonconformist minister, who had been in arms with the Duke of Monmouth. The indictment stated that, "well knowing one John Hicks of Keinsham, in the county of Somerset, clerk, to be a false traitor and . . . traitorously to have conspired and imagined the death and destruction of . . . the king," she "secretly, wickedly, and traitorously" did "entertain, conceal, comfort, uphold and maintain" the said John Hicks in her dwelling-house, and "maliciously and traitorously" gave meat and drink to John Hicks. She had, as a matter of fact, admitted him into her house; but in her defence she said that she thought that he was merely a nonconformist minister, who had broken the law against preaching. It was never proved that she knew that he had been in arms with Monmouth, and her conviction was obtained in defiance of all the rules of English justice.

The trial took place at Winchester on 27th August, 1685, before Lord Chief Justice Jeffreys and several other judges. As Lady Lisle, or Mrs. Lisle, as she is variously described during the trial, was old and very deaf, one Matthew Browne was told off to stand near her and tell her what passed in the Court. Polloxfen, a barrister who was much thought of by the Presbyterians, was the leading counsel for the Crown, and opened the case. After he had finished, Lady Lisle interposed and said that she abhorred the rebellion as much as any woman in the world. Jeffreys, however, stopped her and told her that she could not speak at that stage of the trial. He explained to her the course of the proceedings, and concluded with an allocution which, in view of the fact that he had clearly determined to convict her, was base and hypocritical to a degree.

"It is absolutely requisite," he said, "that the usual forms and methods of law be inviolably observed, and be sure it does the prisoner no injury that the law is kept so strictly to; and we have that charity, as well as justice, that it becomes and is not below all Courts to have for persons in your condition; and we are obliged to take care that you suffer no detriment or any injury by any illegal or irregular proceedings. For though we sit here as judges over you by authority from the king, yet we are accountable, not only to him, but to the King of kings, the great judge of Heaven and earth; and therefore are obliged, both by our oaths and upon our consciences, to do you justice, and by the grace of God we shall do it, you may depend upon it. And as to what you say concerning yourself, I pray God with all my heart you may be innocent."

The first witness who was called was one Pope. He said that he had been taken prisoner by the rebels, and that Hicks came to him and offered to speak to "the King" for him, expressing surprise that Pope, being a Protestant, should serve a Popish prince. "The King" was, of course, the Duke of Monmouth, who signed himself during the campaign "James Rex." The next witness, Fitzherbert, corroborated Pope, saying that he had seen Hicks in the Duke's army, and that he had discoursed with Pope nearly an hour, disparaging the government and James the Second and extolling the Duke of Monmouth. The third witness, Taylor, also corroborated Pope.

The next witness was James Dunne, whose evidence was the most important in the case. Polloxfen told the Lord Chief Justice that he was a very unwilling witness, and asked Jeffreys to examine him himself. The judge thereupon warned Dunne in a long allocution to tell the truth, reminding him that the "God of Heaven may justly strike



thee into eternal flames, and make thee drop into the bottomless lake of fire and brimstone, if you offer to deviate the least from the truth, and nothing but the truth." Then Jeffreys examined him, or rather put him through a minute and severe cross-examination. Dunne was clearly trying to tell as little as he could, and fenced with the questions with considerable astuteness. But Jeffreys handled him with extraordinary skill, and it is impossible not to admire the ability with which Jeffreys elicited his evidence.

Dunne said that on Friday, 24th July, 1685, a messenger came to him and asked him to go to Lady Lisle's house, Moyle's Court, on behalf of one Hicks, and ask her if she would entertain Hicks. Dunne lived in the parish of Warminster, about twenty-six miles away from Moyle's Court, and set out on the next day, Saturday. When he came to Salisbury Plain he was at a loss how to proceed further, and he accosted one Barter, who agreed to show him the way. When Dunne finally reached Moyle's Court, he had an interview with Lady Lisle, who said that Hicks might come on the following Tuesday. Before parting, Dunne arranged with Barter that he should meet him again on Tuesday, on Salisbury Plain, to act as a guide a second time. Barter had his suspicions of Dunne and his errand, and on the following Monday went to a local justice of the peace, Colonel Penruddock, who agreed with Barter to go to Salisbury Plain on Tuesday, in order to arrest Dunne and his friends. On Tuesday the messenger who had originally come to Dunne, accompanied by Hicks and by one Nelthorpe, who had also been in arms for Monmouth, came to Dunne's house, and they all departed together for Moyle's Court. Barter met them as arranged on Salisbury Plain, but for some reason or other Col. Penruddock was not there to intercept them. Barter accompanied Hicks and Nelthorpe till they came to a point about eight miles from Lady Lisle's house. Here they discharged him, and got one

Fane to guide them for another seven miles, and when they were about a mile from Moyle's Court, they discharged Fane also. Dunne stated that when they arrived at Moyle's Court he saw Hicks and Nelthorpe no more, but later in the case he admitted that he had supper with them in the presence of Lady Lisle. Such was the story told by Dunne. Next morning, Wednesday, Colonel Penruddock came to the house with the necessary assistance, and arrested Dunne, Hicks, and Nelthorpe.

In the course of Dunne's evidence there were frequent adjurations on the part of Jeffreys to tell the truth. "I only bid you have a care," he says. "Truth never wants a subterfuge, it always loves to appear naked, it needs no enamel, nor any covering; but lying and snivelling and canting and Hicksing always appear in masquerade. Come, go on with your evidence." Jeffreys pressed Dunne unsparingly, and followed the twistings and turnings of the witness with merciless tenacity. From time to time he induced him to tell the truth by saying that he himself already knew it. "Look to it that you be sure to tell me the truth, for I know it to a tittle, I can assure you that." Jeffreys had had an interview with Nelthorpe, who was then a prisoner in London, and undoubtedly he knew a great part of the truth. Here is a specimen of the way in which the chief justice wheedled out of Dunne the name of Fane, who had guided Hicks and him part of the way to Moyle's Court:—

*L.C.J.*—"Thou sayest well. Now must I know that man's name.

*Dunne.*—The man's name that I went to at Marlow, my lord?

*L.C.J.*—Yes, and look to it, you tell me right, for it may be I know the man already, and can tell at what end of the town the man lives, too.

*D.*—My lord, I cannot tell his name presently.

*L.C.J.*—O! pray now, do not say so, you must tell us; indeed, you must think of his name a little.

*D.*—My lord, if I can mind it I will.

*L.C.J.*—Prithee do.

*D.*—His name, truly, my lord, I cannot rightly tell for the present.

*L.C.J.*—Prithee recollect thyself; indeed thou canst tell us if thou wilt.

*D.*—My lord, I can go to the house again if I were at liberty.

*L.C.J.*—I believe it, and so could I; but really neither you nor I can be spared at present, therefore prithee do us the kindness now to tell us his name.

*D.*—Truly, my lord, I cannot mind his name at present.

*L.C.J.*—Alack-a-day, we must needs have it! Come, refresh your memory a little.

*D.*—My lord, I think his name was Fane.

*L.C.J.*—Thou sayest right; his name was Fane truly; thou seest I know something of the matter.

As the case went on Jeffreys became more abusive to Dunne. "Prithee, what trade art thou," said the judge. "My lord, I am a baker by trade," replied Dunne. "I assure thee, thy bread is very light weight, it will scarce pass the balance here," was the judge's comment. He addressed him as "you impudent rascal," and "you block-head," and "thou vile wretch." He indulged freely in his favourite profane exclamation, "Jesus God!" "It is infinite mercy," he says, "that, for those falsehoods of thine, He does not immediately strike thee into Hell." Jeffreys dismissed Dunne with the remark, "Thou art a strange, prevaricating, shuffling, snivelling, lying rascal."

Barter, who had guided Dunne, was next called. He said, *inter alia*, that when Dunne and he got to Moyle's Court, Lady Lisle "goes to this man Dunne and there she was laughing with him, and looked upon me, and afterwards, when we were going along, I asked him what she laughed at. He told me, my lord, my lady asked whether I knew anything of the concern, and that he answered her, No. This the fellow told me was that she laughed at." Dunne was recalled to explain this incident, and he said that Barter's story was true. He was asked to say what the business was to which Lady Lisle referred, but he remained silent, "as if musing." Again and again he was pressed for a reply, but he obstinately kept silence. Jeffreys appealed to him repeatedly, quoting scripture and bursting out with pious exclamations of horror at his obstinacy. "A Turk," said Jeffreys, "is a saint to such a fellow as this . . . . O blessed Jesus, what an age do we live in." Even the Lord Chief Baron Montague joined in the appeal to Dunne. At last the witness said that the business was, whether Hicks was a nonconformist. Jeffreys thereupon burst out, "Why, dost thou think, that after all this pains that I have been at to get an answer to my question that thou can'st banter me with such sham stuff as this? Hold the candle to his face, that we may see his brazen face." It is not surprising that poor Dunne bleated out, "My lord, I am so baulked, I do not know what I say myself. Tell me what you would have me to say, for I am cluttered out of my senses." Barter was then recalled, and made the damning statement that Dunne had told him that he had concealed Hicks and Nelthorpe in his own house for ten days. After this Dunne was completely discredited, and Jeffreys ordered that an information of perjury should be preferred against him.

Colonel Penruddock was next called. He was the magistrate to whom Barter had gone and told his suspicions

about Dunne and his friends. As a result of that communication Colonel Penruddock had gone with some soldiers to Moyle's Court on Wednesday morning, and had taken Hicks and Dunne in the malthouse, and Nelthorpe in a hole beside the chimney. Lady Lisle, on being questioned by Colonel Penruddock, denied any knowledge that Hicks and Dunne had been in her house. When Colonel Penruddock was giving his evidence she ejaculated, "My lord, I hope I shall not be condemned without being heard," to which Jeffreys replied, "No, God forbid, Mrs. Lisle. That was a sort of practice in your husband's time. You know very well what I mean. But, God be thanked, it is not so now. The King's Courts of law never condemn without hearing." One Dowding corroborated the evidence of Colonel Penruddock.

Mrs. Carpenter, the wife of Lady Lisle's bailiff, was next called, and gave evidence as to the arrival of Hicks, Nelthorpe, and Dunne, and as to their having supper in presence of Lady Lisle. She was followed by her husband, the bailiff, who also gave evidence. At this point, Dunne struck in and offered to tell the truth, whether it made for him or against him. He said that Lady Lisle had asked him whether Hicks had been in the army or not, and he told her that he could not tell, he did not know who he was. He admitted that he had supper with Hicks and Nelthorpe, and that there was talk of the battle and of their being in the army, while they were at supper. It was not, however, specifically stated that Lady Lisle was present during this conversation.

The case for the Crown being concluded, Lady Lisle was called on for her statement. She said that she had abhorred the rebellion, that she was loyal to the king, that her son had fought on the king's side in the rebellion, and that she knew nothing about Nelthorpe. She said, "I knew of nobody's coming to my house but Mr. Hicks, and for

him I was informed that he did abscond by reason of warrants that were out against him for preaching in private meetings, but I never heard that he was in the army, . . . being a Presbyterian minister, that used to preach and not to fight." After Lady Lisle's statement, the Chief Justice charged the jury at some length. He denounced nonconformist ministers as "the bell-wethers of rebellion," and indulged in a great deal of pious moralising about rebellion in general and the Monmouth rebellion in particular. About three-fourths of his address was quite irrelevant, and he wholly failed to show that there was any evidence to prove that Lady Lisle had any guilty knowledge that Hicks had been a participant in the rebellion. He referred to the fact that her husband had had a hand in the death of Charles the First, and that he had also been judge when Colonel Penruddock, the father of the witness, had been condemned to death for fidelity to Charles the First. Those facts had, of course, nothing to do with the case, and were simply introduced by Jeffreys to prejudice the jury. When Jeffreys was finished, the question was raised by a juryman as to whether Lady Lisle could be found guilty, seeing that Hicks had never been convicted of treason, but the judge said that she could.

After a prolonged absence which greatly irritated the judge, the jury came back and said that they were not satisfied that she knew Hicks was in the army. The following dialogue then took place:—

*L.C.J.*—"I cannot tell what would satisfy you. Did she not enquire of Dunne whether Hicks had been in the army? And when he told her he did not know, she did not say she would refuse if he had been there, but ordered him to come by night, by which it is evident she suspected it; and when he and Nelthorpe came, discoursed with them about the battle and the army. Come, come, gentlemen, it is a plain proof.

*Foreman.*—My Lord, we do not remember that it was proved that she did ask any such question when they were there.

*L.C.J.*—Sure you do not remember anything that has passed? Did not Dunne tell you there was such discourse, and she was by and Nelthorpe's name was named? But if there were no such proof, the circumstances and management of the thing is as full a proof as can be. I wonder what it is you doubt of?"

This is incorrect. There is no specific proof that she discoursed with them about the battle and the army. Dunne did not say she was present when there was discourse of the battle. In spite of the statements of Joffieys, the case was not proved, and the jury showed their consciousness of this by thrice returning a verdict of "Not guilty." It was not until the Lord Chief Justice threatened them with an attainder of jury that they brought in the required verdict of "Guilty." Strenuous efforts were made by influential friends of the prisoner to save her life, but they proved unavailing. She was beheaded on the 2nd of September, 1685, in the market place of Winchester.

It has just been stated that the case against Lady Lisle was not proved. She may have been extremely foolish in harbouring a nonconformist minister, after a rebellion in which many such ministers had taken part, and when the countryside was full of rebels trying to evade capture. But the *scienter* was never brought home to her, and the *scienter* was necessary to her conviction. There was the further point that was taken by a jurymen, that she could not be rightly convicted of harbouring Hicks till he was proved guilty of high treason. The judge brushed this objection aside, but it was an objection that went to the very root of the matter. On grounds alike of law and common-sense, it was grossly unjust to convict Lady Lisle of harbouring a

traitor, until the alleged traitor had been proved guilty of treason. After the accession of William and Mary her attainder was reversed, and one of the reasons given for doing so was "that she was, by an irregular and undue prosecution, indicted for entertaining and concealing John Hicks, a false traitor, knowing him to be such; though the said Hicks was not at the time of the trial attainted or convicted of any such crime."

Unjust and cruel as Jeffreys was, one is forced to admit his great ability, and to recognise his astonishing success in his profession. A brief reference to his career may not be out of place in this account of the trial that probably most damaged him in the public estimation. He commenced his career as a barrister of a rather low class, confining himself chiefly to the Old Bailey and the London and Middlesex Sessions. He was addicted to drinking and fond of low company, and it was said that his pothouse companions proved useful in recommending him for business and bringing him briefs. Lord Campbell, whose statements, however, must always be taken *cum grano salis*, says, "At his outset there was no art, however low, to which he would not resort with a view to get on." He ingratiated himself with the aldermen of the City of London and particularly with a wealthy namesake (but no relation) of his own, Alderman Jeffreys of Bread Street Ward, who had great influence with the livery. The result of his popularity in the City was that, at twenty-three years of age, before he had been two-and-a-half years at the Bar, he became Common Serjeant of London.

After his appointment as Common Serjeant he aspired to a better class of work than the criminal business which he had been doing. He transferred his attention to the King's Bench, and worked himself into commercial cases at the Guildhall. In 1677, while still under thirty, he was made Solicitor-General to the Duke of York, and was



knighted. In 1678 he became Recorder of London. A year or two after he was created Chief Justice of Chester and was appointed to the post of King's Serjeant, which gave him precedence of the Attorney-General in Westminster Hall, receiving also the honour of a baronetcy. In 1683, at the age of thirty-five, he became Lord Chief Justice of England, and two years after he was created a peer as Baron Jeffreys of Wein. In September, 1685, after his return from the "Bloody Assize," he was created Lord Chancellor. He ceased to sit on the Woolsack on the flight of James the Second, and he died in the Tower on 19th April, 1689, in the forty-first year of his age.

While this wonderful career was undoubtedly furthered by all the arts of intrigue and wire-pulling, Jeffreys would not have risen so rapidly as he did, if he had not been possessed of remarkable ability. He had a sweet and powerful voice that at once fixed the attention. He argued points of law with great ability. "He was of bold aspect, and cared not for the countenance of any man." He was famous for his talent in cross-examination, during which he was given to indulging in banter and ribaldry. The grave and religious Sir Matthew Hale, Lord Chief Justice of the King's Bench, fell much under his influence. "Sir George Jeffreys," says Roger North, "gained as great an ascendant in practice over him as ever counsel had over a judge." Lord Campbell says, Jeffreys was particularly good as a *nisi prius* judge. "His summing up," says Campbell, "in what is called *The Lady Ivy's Case*, an ejectment action between her and the Dean and Chapter of St. Paul's, to recover a large estate at Shadwell, is most masterly." Speaker Onslow said, "He had great parts, and made a great Chancellor in the business of that Court. In mere private matters he was thought an able and upright judge." He was much abused for his decision in a suit which was instituted to determine whether a large

sum of money belonged to his son's prospective wife, the daughter and heiress of the Earl of Pembroke, or to her father's creditors. He decided in favour of his future daughter-in-law, and strong things were said about his judgment. But he had taken the precaution to call in the assistance of the Master of the Rolls, Mr. Justice Lutwich, and Mr. Justice Powell, and, though an appeal was heard after the revolution, the decree was first affirmed by the Lords Commissioners of the Great Seal and then by the House of Lords. It was thus made clear that the judgment was right.

In conclusion, it may be said that Jeffreys was a striking example of the strong and unscrupulous type of lawyer and judge that has periodically appeared in English history.

" Men, born to be controlled,  
Stoop to the forward and the bold,"

and men of the type of Jeffreys generally reach their goal. He believed that the easiest line of advance in the reign of James the Second was to please the king. He believed, no doubt with good reason, that he would best please the king by severity and cruelty in punishing the Monmouth rebellion. He allowed no scruple or sentiment of pity to stand in his way in accomplishing his end. Men of this sort sometimes attain complete worldly success, and die rich and prosperous. It is satisfactory to know that from Jeffreys some retribution was exacted for his inhuman conduct.

J. A. LOVAT-FRASER.

#### IV.—THE KING'S PEACE VERSUS MOB-LAW.

##### I.—THE KING'S PEACE.

THE statue of Justice with the scales and sword is to those who recognise the origin of all law a correct symbol. The significance of the sword is marked by placing

it, not at the feet, nor as part of the design of the pediment ; not even in the left hand but in the right. Tribes and nations, alike in their domestic and foreign affairs, are on their way to the second rate grade, when anything but the sword is in the right hand, whether it be a treatise on philosophy or a ledger, or even the scales of justice. Unfortunately, in making grants for the education of the nation there was one thing the Legislature determined should not be taught ; wood-carving and shorthand were eligible, anything, in fact, from A to Z, as long as it was not history. This left the next generation to grapple with social problems, such as the dealing with strike riots, as if they were new phenomena ; and as if justice, like wisdom, had sprung full grown from the head of Zeus, that is the central power. No nation forming a loose union under a strong king from a chaos of warring tribes would have made such a mistake, and all nations originated in this way ; justice was before the king, before the customs of the race could be declared by the wise men with the assent of the warriors. It emerged not as the Roman lawyers fancied, to give a theoretical sanction to the Prætorian edict, in a lost law of nature, formulated in a state of primæval peace, but when the men of any settlement made a war band for the protection of the weak ; and, as the social animals still do, made it desperately unsafe to kill their young, because they were ready to, as the Anglo-Saxon hearth comrades were,

" Either life forsake  
Or the loved one wreak "

To fail in this duty was in the earliest records to incur contempt and the forfeiture of lands ; and before all records to be an outlaw to the tribe, a wolf's head whom any man might slay.

In the oldest poem in the language there is an account of an early assize. The king, the aged keeper of the folk, charges the grand jury. He reminds them of the law when,

after provocation and reprisals, brother avenged brother, and the smiting hand made reckoning for feuds enough. The prototype of the sheriff with the *posse comitatus* is there in the war band, and the thegn that is most trusted. They make cold and painful marches instead of cross-examination and speeches; and the verdict is delivered by the pursuing jury who all the night through cry to the offenders that they are round them, and that in the morning their chief will reach them with the edge of the sword, and hang those, who are not slain, on the gallows-tree to please the birds.

The dream of primæval peace is as old as time and as fresh as fancy. It was sought, before geography had filled the vacant spaces by records of the explorers among the blameless Ethiopians of Homer, as in the western sea, whither Saint Brandan actually voyaged in search of it. Till writers like Sir Henry Maine investigated the past, history almost gave it a habitation and a name in the Golden Age, and social philosophy inheritors in the noble savages, the unspoilt children of nature; while the great jurists of Rome discovered its code in the essentials that they found beneath the varying legal practices of the Italian States. The explorers found no earthly paradise in the unknown oceans, it should have been there, no doubt there were arguments to prove its necessity, as in a lesser degree easier roads for commerce should have been. There were roads to the South to India, there must then be roads by the North. Was there no way to a peaceful sharing of the new commerce for the Dutch and English, but centuries of warfare in the Atlantic? Were there no races of men in the past who did justly without compulsion, and none in the new world with its boundless possibilities? Is there now no possibility of peace but by war? Is a nation justified in exercising force when internal dissensions threaten the peace? An *imperium* was the supreme authority, bestowed on the chief officers of the republic for the common safety:

can there be a subordinate *imperium*, an *imperium in imperio*? Can the International Tribunal at the Hague hold a fretful realm in awe, unless it has an armed force at its disposal, or the decisions of the judge be enforced without the sheriff? These are pressing questions in our time, and cannot be answered without the law that is to be found in history, making clear the origin of justice as it has been and is, and not as some think it should be, the offspring of effortless virtue.

More than once social philosophers have arisen, who have explained that when nations realise what war will entail, war will automatically cease. Their contention is perfectly just; it would, however, be strengthened by pointing out that the idea is by no means a new one. It has not only been formulated before, but acted on. All kinds of industry are given up when they cease to pay. There was a siliceous Sheffield at Cissbury on the South Downs in the stone age; the manufacturers of flint weapons were prosperous; but they and their manufactures became out of date with the advent of the makers and wielders of bronze. As long as trade is so undeveloped that duties are very high, it pays to smuggle and to insure against the risk of the cargo being captured. The profits are both great enough to stand the premium, which is paid in Holland or elsewhere, and to tempt men to run the risk of death or imprisonment; but in time with lesser duties, there ceases to be even the necessity for a coastguard. Smuggler, pirate, or viking is not any longer a term of pride; they lose their heroic association and become connected in the popular idea with Execution Dock. The outlaws of the forest become merely the convicts escaped from Dartmoor; the last survivors of freebooting on the borders, whose forces were numbered by thousands, and who were ready to spend huge sums to prevent a comrade suffering the penalty of the law, disappeared when the Wardens of the Marches were no

longer needed, and England and Scotland came under the same king. The peace of the waters began with the navies of Alfred and Eadgar:—

“ Was no fleet so insolent  
No host so strong,  
That in the Angle race  
took from him aught  
the while the noble king  
rul'd on the royal seat.”

The coast became unsafe whenever its defence was neglected, as it was before the defeat of Hastings. There was no sweet reasonableness that guarded the sea, but the obedience to the common cry of the sea that was answered by armed men, as it came surging up through the land. The vikings came still, till raiding began not to pay; the French came always; the men of the Peninsula infested the Channel till Edward won the victory of the Spaniards on the sea. Briefs were read in the Devonshire churches as late as the days of Charles II, to release captives carried off by Algerian pirates. England has been free from invasion for centuries, because the justiciars of the sea kept the peace. Charles I lucidly explained the connection between a navy and justice, when he wrote: “The king will suffer no other fleets or men-of-war to keep any guard upon these seas, or there to offer violence, or take prizes or booties, or to give interruption to any lawful intercourse. In a word, His Majesty is resolved, as to do no wrong, so to do justice, both to his subjects and friends, within the limits of his seas.”

There need only to be a declaration of war, for it to be instantly understood with no need for explanation that war is inseparably connected with justice; the nation would know in a moment that an admiral like Lord Charles Beresford was a justiciar. They would not even need to be told that it is only under the protection of a captain

like Blake, that their persons would be safe, declaring that none but an Englishman should chastise an Englishman; or their property under a seaman such as Nelson, who on the evacuation of Corsica pulled out his watch and gave the committee one quarter of an hour to consider whether they would wish him to open fire or not. But on peace within the realm ideas are more misty; memories are short, and this generation has forgotten what was as familiar to their fathers as almost a daily routine, when village constables were still elected, and the militia went out to guard the coast. If the history of law were still taught among the other branches of social history, men would need no telling that keeping the peace was both a passive and an active duty. All citizens are bound not to break it, but they are also bound to see that others do not break it. The real as well as the theoretical perception of these two obligations quicken the national consciousness, and make a nation ready to forestall disorder by giving no cause that it should be broken. The duty of making the law, administering the law, and seeing that the law is obeyed, are not divisible. When they are divided injustice or discontent follows, and not until the endeavour to restore the peace becomes a pressing problem is there recognition of the fact that a wise policy gives no cause for offence that can only be remedied by war. It is forgotten that there never has been a time when it has not been known that there were worse things than war. Polybius, Tacitus, *Le Roman de Rou*, connect justice with war: "I admit, indeed, that war is a terrible thing; but it is less terrible than to submit to anything whatever in order to avoid it. Captivity for their women is a thing their men abhor. No man can be respected by others who fails to secure justice for his own." Nations despairing have known this truth; they have opened their gates to Saracens, Moors and Turks; citizens even fled from the

Roman Empire to live among the Goths; the coming of the barbarians freed the slaves.

The truth is written large in history; but the broad outlines have the details filled in when we come to the history of England and English law. Since without life nothing is of value, the blood feud comes first in the history of warlike peoples, though it may be safely conjectured that, while many a child knows of the cities of refuge in the time of Joshua, it would be difficult to find one who was acquainted with the regulation for the avenging of blood in his own country. Yet the appeal to battle was actually made at the beginning of the nineteenth century in a trial for murder before the Lord Chief Justice (*Rex v. Thornton*).<sup>1</sup>

The Justices of Assize do not appear suddenly, *dei ex machina*, to conduct trials for capital offences, sent into the counties with the king's commission to do justice between him and the prisoner at the bar. The very formula of the juror's oath recalls that it is the people who pass between the prisoner and the sovereign justice—that the central power merely regularises and enforces the justice of the folk. According to Chief Justice Vaughan in the reign of Charles II, it is not even the judge who implicitly declares the law, for the jurors are the ancient law-makers, "they resolve the law complicately with the fact." They declare the law, as a petty jury, because long before there were judges they declared in the folk-moot the custom of the race; with clash of spear and shield they adjudged all murderers to be outlaws and banished men. The resolutions of the Witan were submitted to them in their county courts, and "weds" taken from them to observe the law. The theory of the law is that the jurors know the law, since all Englishmen know it, having declared it or hearing it promulgated, assenting to it. They not only declare the law,

<sup>1</sup> Abraham Thomson had to be discharged as the challenge was refused. The ordeal by battle was abolished in 1819 (59 Geo. III, c. 6).



they demand the law; the Danes and Saxons were unanimous for Eadgar's law. William the Conqueror summoned the juries of all the shires of England to declare what Eadward's law was; as full and sufficient a parliament, Lord Hale declared, as was ever held in England. The law makers enforce the law, for Henry III summoned all the juries to besiege an obstinate noble who had imprisoned the king's judges in Bedford Castle; they took the castle, hanged its defenders, and thrust Fulk, the rebel, into exile. The committal for contempt of Court exists long before any king appointed judges; the customs of the City of London declare the duty that lay on every citizen to pursue the criminal from one shire to another by the king's "oferhynes"—that is, contempt in the present legal sense of the term, and also the penalty affixed to such contempt. The pursuit was for the common "frith" of us all, and the memory that justice has its origin in war is preserved in the indictment of prisoners for offences against the peace of the king, as it used to be against the peace of the hundred, of the lord, of the bailiffs, or the sheriffs, according to the Court in which the case was tried. The matter was so well understood that metaphor declared the devil was out of God's peace.

With this reading of the term peace many things in history take on a different aspect. Slavery is a merciful commutation of the death penalty; ransom is a compensation for the slain, and a war indemnity; the man who makes public or private war, more especially in the form of a sudden raid, is "out of the peace." In a battle with Ethelred, king of the Mercians, an Earl declares that a prisoner deserves to die because "all my brothers and relations were killed in that fight." Olaf Haraldson is ready to negotiate peace with the Swedish king in 1017, excepting for the death of his men, for the Swedish king cannot with money pay for the men the Swedes have deprived us of. When the feeling of England was very

bitter against Scotland, "the Englysshmen wolde not saue them though it so were that dyvers Scottes offered gret sumes of money for theyr lyves." In our own day where primitive justice prevails there is still the custom of reckoning the slain on one side against those slain on the other, and paying the manslaughter mulct for the remainder. From this the first step is the regulation of private war; the fixing of the wergild for the life of each man according to his degree, and the angylde of stolen property. Before the fight takes place the ealdorman or the king is to be appealed to; the reeves of each district are to come with their forces to pursue the criminal, as the sheriff before the days of railways accompanied the king's judges from county border to county border. If, for the first time, the sculptor had to fashion a statue of Justice, it may be questioned whether he would not make it, like Tennyson's Freedom, not with a sword of wrath, but the scroll of the latest Act of Parliament, or a volume of the *Digest*. Those who first brought justice among men copied reality, as they saw it in their lives, and made weapons of war symbolise Justice. The people of England demanded the law of Eadward. Mr. Inderwick, in his *King's Peace*, says that, by the arms of the reigning sovereign were placed in the King's Bench the arms of Eadward. The chronicler of the Coronation of Henry III says, that the sword "Curtein" was carried, the sword of the Confessor, as a symbol that the justice of England could be turned against the king himself. The mace was the sign of the authority of local jurisdiction. Cities were communities that had right to use *Regaleius*, that is, sovereign rights within the city limits. The sword was the more effective weapon, and was the sign of a higher authority. With it the earl received his earldom; with it the knight was made the representative of his fellow knights in the county court. John received the sword of the Duchy of Normandy in the Cathedral of

Rouen. After the unction, Archbishop Baldwin handed to Richard I the sword of justice to the spirituality; the archbishop still gives a kingly sword "brought now from the altar of God by us the bishops and servants of God, though unworthy." In Shakespeare's picture of investiture, Gascoyne, the Lord Chief Justice, is thus given back the authority that had lapsed on the death of Henry IV:—

"You did commit me  
 I or which I do commit into your hand  
 The unstained sword that you have us'd to bear."

Helping to keep the peace might be set against breaches of the peace; Falstaff was told that Shrewsbury might be set against Gadshill. Henry VIII excused from service beyond the sea a man who was to assist in maintaining order in his county. The king's justiciar in the last resort is not a person learned in the law; in 1180 Henry de Lucy took prisoner William the Lion. What happened when a king could not keep the peace by strength of arms? Douglas, in the reign of James II, forbade anyone to obey the king's officers on pain of death. The men of the Isles burned and harried the country wherever they came or went, and spared neither young nor old. In the days of Henry VIII the Lord Deputy had to interpose with his armed power between Irish chieftains. In the reign of William III was fought the last open battle between two Scottish clans; in the time of Pitt armed resistance was made in Ireland to the judgment of the Courts of law.

Adam Smith, whom most people would regard as an apostle of peace, declared all improvements in Russia might be traced to the establishment of a standing army. It was in his opinion an instrument which executed and maintained all the reforms of Peter the Great. That degree of peace, which that country has ever since enjoyed internally, is altogether owing to the influence of that army. In England the story of the establishment of

a citizen army goes side by side with the better administration of justice. As William the Conqueror summoned the juries of all the shires to declare the law, so he bade all landowners come and swear fealty to him in the great gemôt on Salisbury Plain; he introduced the inquest from Normandy and ascertained the resources of the kingdom on the oaths of men in the neighbourhood. Henry I sent itinerant judges among his people, and he it was who captained the English, encouraged by their voices to make no terms with those that broke the law: "Heed not these traitors"—our Lord King Henry. Henry II became the justiciar of Stephen, putting down the barons who had usurped the royal rights. He again sent the justices on their *iters*, and that they might have force enough behind them to bring powerful offenders to justice, saw to it that by the Assize of Arms every freeman was adequately armed. The Statute of Winchester enforced the hue and cry from town to town and county to county; the village bailiff was enjoined to see that every man had the armour which the law required him to possess; he became a petty constable or captain. The constables were to report to the justices of the peace, whose office was derived from that of the guardians of the peace elected in the County Court; constables commanded a hundred infantry in war; the duty of both was to prevent riots and forcible entries.

With these facts in his mind, it was clear that the Attorney-General could do no less than advise George III that force could be used to suppress the Gordon Riots. If social history were taught, neither king nor cabinet would have needed a legal opinion. There is a popular belief that the Riot Act must be read before soldiers can be used. Lord Chief Justice Tindal, in charging the Grand Jury at Bristol in 1832, reminded an age that had forgotten what every citizen had known in ruder times. "The law acknowledges no distinction between the soldier and the

private individual; the soldier is still a citizen, lying under the same obligation, and invested with the same authority to preserve the peace of the king as any other subject. If the one is bound to attend the call of the civil magistrate, so is the other. If the one may interfere for that purpose when occasion demands it without the requisition of the magistrate, so may the other too. Still further, by the Common law, not only is each private subject bound to exert himself to the utmost, but every sheriff, constable, and other peace officer is called upon to do all that in them lies for the suppression of riot, and each has authority to command all other subjects of the king to assist them in that under the king."

If there had been judges in the time of Athelstan, so would have been the charge to the jury, when the Danes broke out, or the Welsh came into the land, or the king's peace was in any way broken.

Every man, the judge would have said, is obliged to attend the assembly, to assist in the work of justice; if he refuses to attend the chief men of the neighbourhood are to ride to him, and take all that he has. If any one will not ride with his fellows he must pay the penalty for contempt. The peace is to be proclaimed in the assembly towards all that the king will to be in the peace. If any man breaks the peace the chief men of the burgh are to ride to the offender and take all that he has; half of this is to go to the king, and half to the men who are in the riding; if he resist it is lawful to kill him. If any one will avenge him then be he foe to the king and all his friends.

This is the historic law of England which, except for the voluntary enrolment of special constables, has been whittled down to apply only to the military and to the police; and unfortunately so, for when every citizen was responsible for the execution as well as for the making of the law, breakers of the peace did not seem to be merely

at odds with a posse of police or a detachment of soldiers, but to be foes to the king and all his friends. Still further this weakening of the national memory affects the law-making assembly, which thus forgets that it is derived from the armed assemblies that among all the free nations of the north met not only to consider the questions of peace and war, the declaration and amendment of the customs of the race, but also the administration of justice. Arms were given to the freeman; the presentation of weapons set the slave at liberty: social life depended on the courage of each man and his neighbours, and justice rested on the armed citizens; in the armed assemblies the kings were chosen; in the House-things was the commencement of political liberty; they became in England the hustings of election. With this derivation from arms the House of Commons tended to become the law-making assembly as well as the only body that could impose taxation; they are there to change the law because they represent the suitors without whose voice no man can be condemned in the local Courts. Because they make the law they are there to enforce it; in them are present the men of all the shires to over-awe powerful offenders as it was their duty to do in their own county courts. Every one has to satisfy the tax-gatherer because the tax-payers are the effective force of the Crown; every one, but most of all the national representatives, is bound to see that grievances are redressed, since, as the Great Charter recognises, war is the only way to redress an intolerable grievance; and when once it has been removed all subjects are bound to assist in keeping the king's peace or in the words of the Charter "to obey the king as before."

KENELM D. COTLS.

## II.—MOB-LAW.

We have the law Divine, natural law, civil law, the law of nations or international law, but they are as the pebbles on the beach in comparison with the law of the mob. They are the teachings of Holy Writ: they are the evidence of harmonious creation; they are the wisdom and philosophy of great and wise men in all ages of the world's history; they are the result of universal habit and custom; they form the rule and guidance of our political and social life, and yet they become but as broken reeds when once set at defiance by the wild and riotous demands of the howling mob. The voice of the mob over-rides all wisdom and sets at nought all prescribed rules of human conduct. Mob-law ordinarily means fire, pillage, destruction, and death. It is a grim and deadly enemy to all order; it knows no master: it is wild, desperate and uncontrollable, and while its fury lasts it rests like a pall over the land. Sometimes, however, the mob is gentle and peaceful and sways its mighty force unarmed and without bloodshed, and, as a strange corollary, out of the mob's wake often rises order, health, happiness, and the wealth and the prosperity of nations.

Mob-law is sometimes the champion of popular rights and the defender of oppression, in which case its ends in the minds of the populace justify its means, and it is encountered under the disguise of patriotism. The word mob-law is distasteful—it has not an agreeable sound—but although you may change its dress you cannot alter its character or substantial and distinctive features. Sometimes it is a riot which is defined to be a disturbance of the peace by few or many persons. Sometimes it is an insurrection, which is said to be the active and open hostility against any constituted government or authority by a considerable number of persons. Sometimes it is called a revolution, the exact meaning of which, according to lexicographers, is a

change in the constitution of a country. Sometimes it is manifested under the name of rebellion, which appears to be, according to Stormonth, to renounce allegiance to a sovereign or a state, while at other times it is purely and simply a mob which is said to be a crowd or multitude of people, rude and disorderly; a crowd; THE POPULACE. And when you seek a definition of populace you find that it is the common people; the multitude; THE MOB. Wherever, therefore, the populace is found rising *en masse*—wherever the common people are heard—it is the cry of the mob that speaks and their mob-law that rules, no matter under what appellation it may be disguised.

Mob-law manifests itself sometimes in revolution, in insurrection, in a *coup d'état*, in lynchings, in strikes, and in boycotting; sometimes it is orderly and works no outward breach of the peace, while at other times it is wild, tumultuous and desperate, putting no restraint on its violence. The history of the world is largely shaped through mob-law. Its pages tell of the result of its mighty upheaval and of the redress of wrong and oppression through the strength of a united and determined people who at times resort to it as the only means of obtaining justice. As an illustration of this, one can refer to the orderly but determined mob of several thousand persons who collected at the wharf in South Boston on the evening of December 16th, 1773. The protest of the American colonies against the Stamp Act of 1765 was contrary to a lawful Act of Parliament duly assented to by the Crown. The colonies had no right whatever to do what they did from a legal point of view, and yet they did it all the same. They adopted one of the most successful instances of peaceful mob-law ever known, which resulted in the almost immediate repeal of the obnoxious Act. The "Sons of Liberty" were nothing less than an association organised for the carrying out of mob-law; that is to say, they were the representative



authority of the people whose will over-rode all other laws and means of restraint. And when the Colonies were persistently taxed without the right of representation, the band of men, disguised as Indians, who backed and urged on by thousands of their fellow citizens, boarded the three tea-ships that lay at anchor, and taking out the chests emptied the cargoes of tea into the bay, they were nothing less than a mob appealing to mob-law as the only means for the vindication of their rights. This noiseless and bloodless appeal to mob-law was the corner-stone of American liberty.

When we glance through the pages of history, discoloured by age or fresh from the printer's hands, our eyes become dizzy with the accounts of what mob-law has done; with its tearing asunder of whole Empires, with its acts of murder and cold-blooded assassination; with its freeing from social and political bondage; with its mighty work in advancing the condition and happiness of the people, and in the attainment of justice for all alike.

The basis of law is power. How this power may be delegated or exercised is another matter, but no law can stand unless sustained by the power that made it, and as all power finally rests with the people at large they are the real law makers. It is the people who alone build and alone destroy, for they are all-powerful. The people finding that certain rules of conduct for the control and guidance of social and political life are necessary, they delegate authority to certain of their number to provide them. For instance, they say they will have a king, and that a hereditary monarchy shall rule the land, and so things continue peacefully for years, even centuries until the people—the same people who crowned the king—being all-powerful—decide to do away with the monarchy. Law-books and constitutions, and charters, and decrees and proclamations of the most formal and solemn character, may be cited against this, and condemn the very suggestion of a change

in the form of government as high treason and punishable with the most cruel and degrading death because the people once so wished it to be; but when they become tired with the existing condition of things and wish a change, then, in the twinkling of an eye, all these written records for the guidance of man's conduct are forgotten and trampled on and mob-law rules instead. Mob-law, as manifested in revolution, is the turbulent sentiment of the people, and even where it is not the wish of the majority, it is the omnipotent power that recognises no other master. Charles X was King of France—he was the head of the nation—the chosen and recognised authority of the people—just as long and no longer than the people were satisfied with his rule. He was a constitutionally-elected monarch, protected by all the safeguards known to the Civil law, and yet, when he made himself obnoxious to the middle classes the people had recourse to mob-law, and casting him to one side chose Louis Philippe in his stead, and called him and his descendants in perpetuity to the throne of France. What did this decree of the National Assembly amount to? Nothing; for it was soon discarded, and the monarchy overthrown and a republic substituted in its place, as the supreme will of the French people manifested through mob-law. The populace, which is nothing more than mob-law, placed the kings and refugees—Charles X and Louis Philippe—on their thrones in spite of the most solemn decrees of the land which, when tested by the fire of public favour, so often fuse into flame and are consumed. In 1794 Danton could not be saved from the executioner and the mob which followed him with insults to the guillotine, because it had been decreed by the populace that “in the name of virtue terror is irrevocably the order of the day.” These are simply instances that serve as illustrations that ordinary law is acquiescence in the established order of things, while mob-law—which is supreme—is hostility to the established order of things.

Mob-law will continue to terrorise the community as it does to-day, unless there is more courage and determination shown by the constituted authorities in its repression. In England, in France, in Spain, in Italy—in fact, everywhere—there is sufficient military and police to quell the first symptoms of riot were they employed promptly and with decision. Instead of this, however, they are hidden from view and withheld until too late to prevent an uprising; there is no manifestation of authority—no steps taken to avoid destruction, but only to punish after the damage is done; the public force is employed not to repress and as a hindrance to wrong-doing, but to remove barricades after they have been erected and to sweep away the ruin after the mob has held high carnival. Who is responsible for this state of things? The Government is, if we are to retain the pretence of civil authority; the populace is, if they are to be allowed to resort to mob-law. Philip Gibbs in the *Graphic* has given a most touching and vivid picture of what occurred at Liverpool—the storm centre of the recent great strike—and described the want of force and vigour in the constituted authorities there to meet the situation and prevent the out-break. “The civil authorities, from the Lord Mayor downwards,” says Mr. Gibbs, “were afraid of the military and police whom they had called to their aid. They were afraid to use them sternly and starkly. On the other hand they allowed the most desperate scenes of anarchy to go unchecked, they failed to protect the property of small traders, and they were miserably weak in dealing with the district in which all the elements of violence were pent up. The situation was nothing less than an appalling tragedy, where weakness was a crime. Those smells were more dangerous than rioting, but the authorities did nothing to prevent the approach of pestilence beyond calling for volunteers on the eve of the declaration of peace. The rioting itself was another disease which called

for a sharp remedy, and in my opinion it was woefully neglected. I became familiar with the sight of wrecked shops and barricaded houses. For nearly three hours I watched hooligan boys, cheered on by men and women, stone every tramcar which passed. They shattered the windows and injured the passengers. They dragged logs across the lines, and tried to wreck the cars. But there were only a few policemen on duty, and no arrests were made. One night I stood for two or three hours at the bottom of Netherfield Road, where a battalion of soldiers with fixed bayonets were stationed as a target for a continual hail of brickbats, bolts, iron files and cobblestones, which hurtled around us incessantly from a street plunged in darkness and barricaded with dustbins and barbed wire. No shot was fired, no arrest was made. It was a reign of terror with no strong man to quell the anarchy."

According to law, an individual's business and property are entitled to protection from unlawful interference and destruction, but mob-law sacks and burns and pillages and tortures; it is the enemy of all life, and wantonly kills the innocent and unoffending even to the mutilation and disembowelling of helpless animals. Neither ordinary law nor the combined authority of the police and the military are sufficient to afford preventive means or give redress, unless the constituted authority has the courage, energy, and decision to act promptly. But constituted authority seems paralysed before the threatening attitude of the mob. In the recent strikes and riots in England and France there was tardy repression but no restraint—no attempt to stop the kindling of the flame—only organised effort to put it out after the conflagration had done much of its destructive work. The suppression of mob-law is slow and cumbersome. It is rarely effected in time to avoid great pecuniary loss. Instead of saving from destruction by efficient preventive methods, municipal governments as a rule prefer to be

held pecuniarily responsible in damages for the material loss, where liable at all. This is not as it should be. The recent upheavals of the populace and the destruction accomplished before the mobs were brought into submission makes it manifest that the constituted authority is helpless to restrain the breaking out of mob-law, and that some other means must be found to meet its sudden and unexpected manifestation. The remedy may lie in public sentiment, and in so forming and shaping the public mind that resort to mob-law will become unnecessary and unwise. If so, this can only be accomplished by the redress of wrong; respect for individual rights and property; the suppression of combinations and pools that unreasonably enhance the cost of living; the regulating of labour and its just compensation; the enjoyment of civil, religious, and political liberty, and the speedy and sure punishment of crime. But if, on the other hand, mob law is as much an inherent characteristic of human nature as the desire to fight, then it becomes questionable whether, as long as man remains as he is at present constituted, there is any well-founded reason to anticipate a change.

Sometimes this inactivity of the constituted authority becomes dangerous for them, and the very mob to whom officials show weakness and hesitation turn against them with frenzied violence. This was so at Verbicaro Calabria in August last during the cholera epidemic. Many deaths occurred, but the authorities neglected to take means for the burial or disposal of the bodies. The population, angered by the conduct of the mayor and other municipal dignitaries, to whose negligence they attributed the spread of the plague, set fire to the municipal buildings and shot and killed the pretore or magistrate, who had been sent to calm them. The mob then seized the mayor's secretary, and, after subjecting him to terrible torture, cut off his head and paraded with it carried upon a pole.

Compensation for damage and loss suffered by a mob or riot was not recognized by the Common law, and it is only where legislation has supplied the defect and made municipalities liable that those suffering injury from lawless intimidation and violence have any redress. The right to reimbursement for damages caused by a mob or riotous assemblages is dependent on the legislative will. Municipal corporations are instrumentalities of the State for the convenient administration of government within their limits. They are invested with authority to establish a police to guard against disturbance; and it is their duty to exercise their authority so as to prevent violence from any cause, and particularly from mobs and riotous assemblages. It has therefore been generally considered as a just burden cast upon them, to require them to make good any loss sustained from the acts of such assemblages which they should have repressed.<sup>1</sup> And even where a crowd of people assemble together and unlawfully tear down buildings without notice or warning to the owner, and no attempt is made by the police or anyone else to stop the carrying out of the purpose of those assembled, the fact that there was no rioting or fighting or unnecessary noise does not excuse the city from liability.<sup>2</sup>

Economic conditions frequently cause an outbreak of mob-law, as illustrated by the dear-food riots and the crusade of the house-wives in France in September. The steady rise in the prices of eggs, milk, butter, bread and meat—the necessities of life—while wages and the price of labour remained stationary, finally exasperated the populace beyond patience, and they then resorted to mob-law. The justness of the cause that led to the subsequent wanton loss of life and property would appear to be on the side of the populace, but no matter how righteous a cause may

<sup>1</sup> *Louisiana v. Mayor, etc.*, New Orleans, 109 U. S. 277.

<sup>2</sup> *Marshall v. City of Buffalo*, 68 N. E. 1119.

be, when once the indignation and fury of the crowd is inflamed, it loses all reason and restraint. In those disturbances mob-law was responsible for many crimes quite apart from the mere defiance of public authority; it actually captured peaceable citizens—kidnapped them and held them as common hostages; and yet who has complained and who has the courage and manliness to complain? It is this fear of mob-law that makes it so all-powerful. It perpetrates the worst crimes and yet it passes on in its red trail of flame, pestilence, famine and death, unmolested. At Bruay, in the department of the Nord, said the *Daily Mail*, several hundred turbulent women decided to march to Valenciennes, five miles distant. One of the leaders of the manifestation suggested they should compel the village "*bourgeoises*"—as the wives of the tradesmen are called—to march at their head. The idea was received with enthusiasm, and at five o'clock in the morning a band of miners' wives and daughters knocked at the residences of the principal farmers and tradesmen, and, under threats of personal violence, compelled the women of the various households to rise and join them.

At one house in the village, where several Parisiennes had arrived the night before, the inmates refused to open the door. It was promptly battered in, and the ladies from Paris, trembling with fear, were forced to dress in haste, and then dragged out and placed at the head of the mob. Two other women, wives of local farmers, were treated in the same way. Then, to the strains of the revolutionary anthem, "*l'Internationale*," the procession started, powerful and determined women, armed with heavy cudgels, walking on each side of the "*bourgeoises*." It was a veritable Calvary for the Parisiennes. Owing to numerous stoppages at wine shops by the way, the procession took three hours to reach Valenciennes. Although the column was escorted by gendarmes and mounted chasseurs, no attempt was made

to deliver the unfortunate victims from the furies who kept them prisoners. When Valenciennes was reached the police stopped the rowdy column, and the unhappy "*bourgeois*," dropping with fatigue, were set at liberty.

This is no romance—no story taken from the dusty shelves of past centuries—but an act of brigandage, committed on the public street and along the national highway in broad daylight, and in one of the most civilized countries of modern times. This shows just how far our modern civilization has progressed. There is little difference between to-day and when Cæsar fell at the foot of Pompey's statue. Mob-law then defied constituted authority as it does to-day, and the liberty of the citizen was as secure then as it is now.

There is much undoubtedly to be said in favour of the justness of outbursts of popular indignation in protest against the increase of the cost of the necessaries of life. These additional burdens are usually the result of illegal combinations of producers or importers—they are monopolies that burden the labouring classes. These are condemned by the Courts of all civilized countries, so that, if in exceptional instances the judicial power becomes inadequate or unable to afford immediate redress, it is not surprising that mob-law, as superior to all other laws, should be invoked and become the comparatively easy means of redressing the wrong. That combinations to enhance the prices of the necessaries of life are inimical to the prosperity and welfare of the people is abundantly proven by the jurisprudence of every country. The Supreme Court of Missouri, in a frequently quoted judgment, said: "Pools, trusts and conspiracies to fix or maintain the prices of the necessaries of life strike at the foundation of government; instil a destructive poison into the life of the body politic; wither the energies of competitors; blight individual investments in legitimate business; drive small and honest



dealers out of business for themselves; and make them mere 'hewers of wood and drawers of water' for the trust; raise the cost of living and lower the price of wages; take from the average American freeman the ability to supply his family with necessary, adequate and wholesome food; force the boys away from school, and into the various branches of trade and labour, and the girls into workshops and other avenues of business, and make them bread-winners while they are yet almost infants, because the head of the house cannot earn enough to feed and cloth his family. The people are helpless to protect themselves. The powers that be must protect them, or as surely as history records the story of republican government in Rome, so surely will the foundations of our government be shaken and its perpetuity threatened." <sup>1</sup>

Constituted authority may be despotic by being positive and aggressive or negative and supine, for in either case it is the autocratic abuse or non-use of power that leads to despotism. The populace at times find the power delegated by them to others to make laws and enforce them is abused or neglected, and that they are living under official despotism. A law may be excellent in itself, and murder, robbery and outrage condemned and punishable, but unless those having the administration of the law in hand perform their duty to the public faithfully and expeditiously, the community at large is just as much under a despotic authority as though the power of life and death was vested in a tyrant. Such conditions as these often exasperate the populace, who rise against what they look upon as a wanton disregard of their rights, and who then seek mob-law to carry out justice according to their own ideas of right and wrong. This is all there is in what is known as lynch-law. It is cruel; it is wicked; it defies all recognised authority; it is contrary to every sense of order and decency, and yet as the manifested evidence of

<sup>1</sup> *State v. Armor Packing Co.*, 173 Mo. 356.

that supreme power vested in the people when they become a raving mob it is only a form of mob-law—the supreme law of the land. The lax and dilatory enforcement of the law is responsible for these outbursts of popular indignation; the people become tired of watching criminals go unpunished through the tardy administration of justice that brings it into derision and contempt. There is a ready means for putting an end to lynch-law, and that is by adopting and faithfully enforcing the existing Criminal law of England, for nowhere in the world is the administration of criminal justice so well and so promptly enforced. The speedy punishment following the committal of the most heinous crime in England is the admiration of the civilised world. There is no unseemly delay; no theatrical posing of the criminal before the public; no morbid appeal to emotional sympathy; no hero worship in the attitude of the ordinary criminal before an English tribunal. Justice here is swift but fair, and its administration is an object-lesson to other countries. There is no need of lynch-law in England because the supreme will of the people is respected by the constituted authority.

Where mob-law is concerned justice is not blindfold—she is open-eyed and acquiescent. Not that some effort or attempt is not made to punish a few offenders on whom by chance the authorities have lain hands. This always happens. But the great social crime—the lawlessness, anarchy, and destruction are never punished. These are like a flash of lightning that shatters into fragments and leaves only wreckage behind—irreparable ruin—for mob-law knows no equality of compensation. In England and in the United States the law is predominant. We say so-and-so is lawful or is contrary to the law, as the case may be, but it is always the law that is held in respect. In Continental countries, on the contrary, it is not the law but the constituted authority that is alone regarded; it is

not the law that the *commissaire de police*, or the *gendarme*, or the *douanier*, or the military enforce that meets with respect, but the officials themselves that are feared and obeyed—it is the instruments and mediums through which the law is set in motion that is recognised, mere law being incarnate in those who administer it. In this way the personality of officials and law officers become correspondingly powerful. An excellent illustration of this occurred in 1830 when the ordinance directed against the press inflamed the Parisians into open opposition. A *commissaire de police* went to the office of the *Temps* to make a seizure, but was met at the door by the editor, who angrily exclaimed: "Our presses are under the protection of the law; in the name of the law I forbid you to touch them." "Take care," replied the *commissaire*, "do as you will; it is you who put yourself in rebellion against authority." "The law is superior to authority," cried M. Baude, "and it is you who put yourself in rebellion against the law." But in that instance legalised authority succeeded for the moment in trampling under foot the law, and the presses were soon rendered unserviceable; but it was not long before M. Baude, at the head of a body of National Guards, took possession of the prefecture and there established himself under the new order of things.

Jurisconsults and philosophers may say that mob-law is after all but a feature of natural law, and from an academic point of view this is undoubtedly true. Thunder and lightning, storm and tempest, drought, floods, fire and death, are as much natural laws as the sunshine, fruit, flowers, the harvest, laughter, love and life. Man's nature and instincts are criminal, and he is as much a brute to-day (if not more so) than in primitive times, for he is in comparison more hypocritical, false and wicked. With no civilisation man lived in close connection with all animal life, and, like the most savage brute, was fearless, cruel, and shrank not from

The sight of blood. The civilisation of centuries has not changed these instincts of man's nature, for man is to-day just as antagonistic, hostile and brutal as when the first tiller of the ground killed his brother. He chafes under the *ennui* of peace and clamours for the rush and thunder of war; as a simple Christian he receives the local homage of the community, but as a Christian soldier who leads to battle with the Bible and the sword he is worshipped by a nation. This well illustrates the falseness and humbug of our modern morals and theology, in the same way that peace congresses and treaties are openly praised and advocated, while those who are foremost in such philanthropic work are secretly negotiating some war loan on advantageous terms—are coining the money that will make rivers run red with blood. So it is that the mob and mob-law rule the world to-day as they have always done, and until human nature changes will probably continue to do. While human passion may not be eradicated, it may be controlled and brought within reasonable submission, at least for a time. To accomplish this is one of the greatest, if not the greatest, work that remains for man's accomplishment. He who can suppress and blot out the possibility of mob-law will be something more than human. It is as difficult to exterminate mob-law as it is to do away with illicit sexual intercourse and drink; but it can be controlled in a measure and made less likely to occur, and this is a work deserving the highest praise. The remedy must come from within, and not from without. Laws, authority, social opinion, power, and force will prove inefficient, for they are like throwing earth on a charcoal fire—they suppress the flames but heighten the fiery heat beneath. The cure must be found within those conditions of social and commercial life, progress, and prosperity that restrain the passions of the brute in man and make him amenable to reason. So long as he can be reasoned with man is not

dangerous, but the moment self-control is lost he becomes a raving maniac who defies God and the universe. Where *and how is this self-control to be found?* There is no limit to what the mob, as represented by the mass of the people—the populace—may not do if they are united and in the majority, and there is no law, human and divine, that they will respect while under the fury of passion. All that can be done is to control and direct public sentiment and opinion, and to teach men the wisdom and profit of honesty, order and moderation; to let them see that their own interests and prosperity lie in the maintenance of constituted authority as recognised by law, and in their respect for honest government.

C. A. HIRSHOII BARTLETT.

## V.—THE BAR IN RUSSIA.

### I.

THE Russian Bar is one of the youngest members of the European family of advocates. It was not till 1864, when the Russian Courts were entirely reformed, that it came into existence. Up to this time the legal profession as an organised body was unknown in Russia, although we find mention in Russian law of the representation of litigants in the Courts in the fifteenth century.

The right to act as attorney was free to anyone with a few exceptions enumerated in law, namely, minors, priests, monks and nuns, officials, persons deprived by sentence of their rights and reputations, &c.

The constant demand for legal advice resulted in the formation of a group of professional attorneys who acted without any control except their duty to their clients, and no moral or educational standard was required of them.

In order to make the circle of their activities and their moral level clear, it is necessary to indicate in outline the organisation of the law courts, and the administration of justice in Russia prior to 1864.

The procedure by open pleading, which was familiar to the Russian Courts in ancient times, gave way by degrees to one of an inquisitorial nature. From the time of Peter the Great this latter method entirely predominated in criminal, and partly in civil, procedure. The preliminary inquiry was in the hands of an ignorant and easily-bribed police. The confession of the accused was deemed to be the strongest proof of guilt, and all possible means to obtain it were employed. Torture was forbidden, but in the entire absence of publicity and of the security of public rights there can be no doubt that physical suffering was often inflicted.

The inquiry closed, the case was sent to the Court of First Instance. The secretary of the Court wrote a report on the merits of the case and quoted the Articles of the Code which, in his opinion, should be applied to it. This report was only the foundation of the future judgment. The accused was not even summoned to the Court, and no explanations were demanded from him. The judgment given, the case went, without any appeal, to a higher Instance for confirmation, and from thence to a higher one still. There were many Instances, and a long period of time frequently passed before the final judgment was given. A similar method of procedure was applied to civil cases, the same report of the secretary, successions of Instances, and endless writing of papers, which grew to such bulk that sometimes several carriages had to be hired to convey the documents relating to a single case. The secretary's report to the Senate as Highest Instance in one case filled two hundred printed sheets, and no fewer than five hundred different Articles which could be applied to the

case were indicated in it. All explanations had to be given in writing by the litigants, and they or their attorneys might only be present in the Courts while the secretary read his report to the judges; everything else was carried on behind closed doors.

It may be well understood that with such a method of procedure the activity of professional attorneys was limited to the composition of applications, appeals and other papers, and in particular to influencing the judges and especially the secretaries on whose reports the decision in the cases practically depended. Both secretaries and judges were extremely vulnerable.

The funds at the disposal of the Ministry of Justice were so ridiculously small that even the Presidents of High Courts received salaries of about a hundred pounds a year, and secretaries and inferior officials could earn only a few pounds a year. Such poor remuneration was obviously impossible to live upon, and bribery and "voluntary presents" from litigants became so much a matter of course that even the Minister of Justice himself ordered a present of a hundred roubles to be given to an official of the Court for the registration of a title-deed for the Minister's daughter, and this order was executed by the Director of the Department of the Ministry of Justice in quite an official way.

Besides being underpaid the post of judge was far from being a dignified one. The judges, although elected for the most part and nobles by birth, had not a shadow of independence. They were entirely under the command of the Ministry of Justice and still more of the Ministry of the Interior. To quote the words of Mr. S. S. Lanskoi, Minister of the Interior between 1855 and 1865, "The Administrative Power rides on the back of Justice in this country."

The Governors of provinces had a right to control the decisions of the Courts, and with how much respect they

treated the representatives of justice can best be shown by the following incident :—

The Governor of Arkhanguelsk summoned the President of the High Court and instructed him what judgment to give in a certain case. When the President showed slight symptoms of resistance the Governor seized a cane, and it was only by the exercise of some agility that the President made good his escape. It cannot be wondered at that the Bench was occupied by men of very low mental and moral level ; some of them could not even read and write.

Corruption in the law Courts grew to an incredible extent, and became the subject of a proverb “ It is equally useless to fight the strong and to try the rich.”

The crimes of the rich, especially those of influential nobles, were left unpunished, even upon full proof of guilt, the judges with the connivance of the police always finding some ingenious pretext for delay. The famous trial in connection with the mysterious disappearance from the Moscow Treasury Board of £15,000 in copper coin lasted twenty-one years. The case of a nobleman named Engelhardt who was accused of murder lasted twenty years. The Governor of the Province of Kursk reported to the Senate in 1850, “ For a long time past crime has been increasing in this province, but has not been punished because of the deliberate intention of the officials to conceal it, thus causing unparalleled injustice, corruption, and bribery.” It was in this province that, when a visit of inspection by a senator was expected, all the papers of the law court were thrown into the river, and the senator himself with the help of other high officials had to fish them out.

The injustice, corruption and bribery reported by the Governor of Kursk were not, unfortunately, peculiar to that province, but permeated the whole of Russia. It cannot be expected that professional attorneys whose dealings were always with police and judges of such a nature would



themselves retain a high standard of purity: Deprived of all moral sense and acting behind the backs of their clients, they used to inundate the Courts with bogus cases and literally rained the ignorant population. "We have two kinds of attorneys," wrote Professor Lokhvitzky in 1860, "one takes sixpence and a bottle of vodka for writing a document, and five or ten roubles for a false passport, with a regular scale for false evidence, false signatures, &c.; the others are aristocrats, well dressed gentlemen with nice manners, who require hundreds of roubles for the drawing up of a document, and of course despise their cheap colleagues, though they often have to turn to them for help in some of their tricks. They dub themselves 'advocates,' nobody knows by what right or for what reason. Some of these have become quite famous and have made large fortunes, their one little defect being that they advise both plaintiff and defendant in the same case, and of course take money from both sides."

To this it remains to add that the profession of attorney was regarded in the same way as that of any other person who worked for hire; they were obliged, like domestics, to register themselves and to present police certificates for the inspection of their employers who might write remarks and criticisms on them.

Such a condition of things could not, of course, exist unnoticed and uncriticised by the thinking public, nor without the knowledge of the Government. Public opinion could not, however, be openly expressed because the Russian press was under severe censorship. When a Moscow magazine published a very moderate article making the suggestion that publicity of procedure in the courts would be preferable to the conduct of all cases *in camera*, further discussion of this subject was prohibited by the insistence of the Minister of Justice, who saw in the proposal a dangerous revolutionary idea. But the criticism which was

not allowed expression can be found in contemporary diaries and journals written by intelligent men of many different kinds, who all concur in condemnation of the degradation of justice in Russia, and display a passionate desire for reform.

As regards the Government they themselves saw the abnormality of existing conditions. The Tsar, Nicholas I, had a sincere wish to improve them. "My chief thought was naturally justice," said he at a State Council. "Ever since I was a boy I have heard of the abuses which exist in this department." During his long reign innumerable Commissions were set to work on the attempted reform of justice. Some of their proposals met with his gracious approval, but all of them found a cemetery among the Government archives and nothing was done. Partial reforms were postponed until the time should come for the entire re-organisation of the Courts, but this could not be undertaken because the existing organisation was an inseparable part of the system by which Russia was governed, a system based on slavery. "If slavery had not been abolished in 1861," wrote S. T. Saroudney, the chief mover in judicial reform, "the reform of the Law Courts in 1864 would have been impossible. So long as slavery existed Russia did not need justice in the Courts. The nobles were really the judges, and in their hands was concentrated absolute power over the mass of the population."

The revolutionary wave which passed over the whole of Europe in 1848 had roused a natural anxiety in Government circles in Russia, and caused the Government to increase their watchfulness. They began to see the terrible apparition of revolution in the most innocent innovations. Count Panin beheld it even in the proposal to liberate the Courts from the circumlocution which clogged their effectiveness; and in his alarm persuaded the Tsar to refuse it his sanction. When, venturing to voice the feeling strong in general

society, Prince Golitzin hinted to the Tsar that the constitution of a Bar in Russia would be opportune. Nicholas I. replied with a frown, "France was ruined by advocates. Who were Mirabeau, Marat, Robespierre, and the rest? No! Whilst I reign Russia does not need advocates."

But then came the 'Sixties—the "Epoch of Great Reforms," as it is called in Russia. Slavery was abolished, and the time was ripe to establish justice in the land.

"Absolute justice, prompt, merciful and equal for all is to be dispensed in the Courts," to quote the famous Ukase of Alexander II to the Senate (Nov. 20, 1864), by which the project of re-organisation of the Russian courts of justice was confirmed and became law.

This law, to which the title "The Judicial Statutes of the Emperor Alexander II" was given, revived the ancient form of Russian procedure by contest before impartial judges, and introduced new liberal ideas and institutions; the separation of judicial power from administrative; the independence and irremovability of judges; trial by jury in criminal cases; and the Bar.

## II.

The Judicial Statutes constituted the Bar a self-governing Order. With a few alterations, that part of them devoted to the Bar remains the law in force to this day.

The whole of Russia is divided into judicial Circuits, in each of which is a High Court. Every Circuit includes several District Courts, or Courts of First Instance. Members of the Bar, who are called in Russia "sworn attorneys" (because of the oath they are required to take on joining the Order), are attached to the High Courts, but they can domicile in any town in the Circuit, and are free to practise in all the Courts, and also in the Senate, which is the Court of Cassation. When pleading before the tribunal they wear evening dress, with a silver badge, the

sign of their admittance to the Bar, in the left buttonhole. If the number of advocates in the Circuit is not less than twenty they may elect a Council, which consists of from five to fifteen members, including President and Vice-president. The list of members of the Council must be handed to the Procureur and published for the general information.

The Council is elected every year at a general meeting of the advocates of the Circuit, which is convoked by the President of the Council. If in any town in the Circuit the number of advocates amounts to ten they, with permission of the Circuit, may elect a branch of the Council.

The Council considers the applications of aspirants to the Bar, nominates the advocates in rotation to conduct unremunerated cases (of poor persons); defines the amount of remuneration of an advocate in cases of misunderstanding with clients, and exercises disciplinary powers over the members of the Order to uphold among them ideas of honour and dignity worthy of their profession.

The Council can inflict punishment upon erring members of the Order—namely, warning, reprimand, interdiction from practising for a year (at most), and expulsion from the Bar. No one of these punishments can be inflicted by the Council without giving opportunity for some explanation from the advocate in fault.

The intention of the Legislature in giving such large disciplinary powers to the Council, a body, be it remembered, elected by the advocates from among themselves, was excellent, and is wisely expressed in the Preamble thus—"While not depriving the advocates of the independence necessary for the defence of their clients, the supervision of the Councils should at the same time assist the prompt and active protection of the interests of the public, and should serve as a means of establishing and upholding among the advocates themselves the sentiments of justice, honour, and

consciousness of moral responsibility towards the Government and Society." Unfortunately its wisdom and generosity were entirely marred by a further provision in the Statutes by which the right was given to the Procurer to bring in the High Court a protest against every decision of the Councils in matters of discipline, and in addition to this the person affected could bring an appeal to the High Court in all cases except those of "warning" and "reprimand." Thus even the refusal of the Council to admit an applicant to the Bar may be the subject of an appeal, but should the cause of his rejection be a purely informal one (such as a question of character) the High Court cannot pronounce upon it. This control of the High Court over the Councils had as we shall see, unfortunate consequences.

The decisions of the Council must be carried by a majority of two-thirds of the members present in questions of prohibition from practice or expulsion from the Order, a quorum of half the Council being necessary. The President of the Council is *primus inter pares* and has no special rights except the casting-vote.

In Circuits with no Council the rights and duties of a Council are exercised by the local District Court.

The qualifications for admission to the Order are the possession of a University degree in law and the fulfilment of five years of "stage" (studentship). The statutes of Alexander II assumed that the Bar would be recruited chiefly from the Bench and the ranks of law court officials, and regarded five years' service in the Courts as equivalent to the required "stage." They also recognised as "stage" five years' practical study of law under the guidance of a barrister (Patron) in the capacity of his assistant.

As a matter of fact the Bar is composed mainly of the latter.

Persons under twenty-five, foreign subjects, bankrupts,

members of the civil and military services (except in honorary posts), persons deprived by sentence of civil rights, priests expelled from their benefices, persons expelled from civil or military service, from the nobility, or from communities, cannot be admitted to the Bar.

The admission being accomplished, the novice takes the oath before the general assembly of judges of the High Court in the following formula:—"To keep fidelity to the Tsar; to obey exactly and conscientiously the laws of the Empire; neither to write nor speak before the tribunals anything which has a tendency to enfeeble the Church, State, community, family or high morality. Honestly and in good faith to perform the duties of the Profession, not to fail in respect to the Courts and Authorities, and to safeguard the interests of clients."

Russian law does not recognise the division into barristers and solicitors as known in England, Russian advocates conducting their cases entirely themselves from beginning to end, including the execution of the judgment.

It was the intention of the judicial statutes to establish a monopoly of the Order, and they contain provisions that litigants may give instructions to conduct their cases only to members of the Bar in towns where a sufficient number of them exist. Not only, however, was no town recognised by the Ministry of Justice as being sufficiently supplied with members of the Bar, but, in 1874, a supplementary body called "private attorneys" was even created, of which more will be said later.<sup>1</sup>

<sup>1</sup> In 1910 the Russian Bar consisted of 4,814 members, and 3,740 assistants (*stagiarcs*). The largest Bar is that of Moscow, which has 871 barristers and 974 assistants. This number is, of course, small compared with the number of cases tried in the Courts of the Moscow Circuit. According to the official report of 1908, the total number of cases dealt with in the whole of the Courts of First Instance in that circuit was 58,518, besides 9,024 left over for the next year. In the High Court 3,636 civil cases were dealt with, and 6,376 were left unfinished. In the Court of Commerce 5,799 cases were decided. The justices of the peace in the city of Moscow in the same year dealt with 87,905 civil cases and 102,673 criminal.

Litigants have a right to conduct their cases in the Courts themselves, or to instruct, besides members of the Bar and private attorneys, also their near relatives (parents, spouses, and children), and the managers of their enterprises or estates. An accused person may apply to the President of the Court to nominate him a gratuitous defender. In such cases the President nominates members of the Bar in rotation, and they cannot refuse to serve. Accused persons may conduct their own defence or appoint anyone, who is not limited in his rights by law, to act for them. Advocates enjoy freedom of speech in audience, but may not allow themselves to use expressions "disrespectful to religion, to law, or to the authorities, nor offensive to any one."

The remuneration of advocates is defined by agreement with their clients, the law fixing no special limit to the conditions of such agreements. If there is no agreement the fee is regulated by a certain fixed scale applicable only to civil cases, and based on a certain proportion to the amount of the action. Fees can be recovered by an action at law.

The client may at any time dismiss his advocate, and the latter may leave his client, but must give sufficient notice.

For neglect of his duty an advocate, besides undergoing disciplinary punishment, is liable for damages, and in case of wilful injury to his client he is subject to trial in a criminal court. It is forbidden to advocates to buy or in any way acquire the actions of their clients. They cannot conduct cases against their own parents or wife, children, brother or sister, uncle or cousin; cannot advise both parties to a case, and must keep the secrets of their clients. They cannot appear as witnesses in the matter of confessions by clients.

### III.

Before the promulgation of the Judicial Statutes of November 20th, 1864, the "Fundamental Principles" of

the forthcoming reform, sanctioned by Alexander II on September 29th, 1862, were published in the "Collection of Enactments and Decrees" in order to rouse public interest and discussion. It created an extraordinary commotion, and raised the liveliest hopes in the liberal portion of Russian society.

But, unfortunately, progressive tendencies in those who govern Russia are shortlived. Almost immediately after the publication of the "Fundamental Principles" doubt and hesitation manifested themselves. Liberal ardour gave place to disappointment and covert anxiety. This change of mind could not but reflect on the work of the reformers. When two years later the Statutes were promulgated, details were found to be introduced which spoiled the purity of the principles upon which they were based, and gave rise to grave fears for the future.<sup>1</sup>

The progressive magazines insistently pointed out that although judicial reform had been contemplated on a larger scale than other reforms, yet even here only such rights as did not touch the prerogatives of the Government were guaranteed.

The opening even of the "New Courts" as they were called in Russia in contradistinction to the pre-reform "Old Courts,"<sup>\*</sup> was continually postponed and did not take place till April 17th, 1866, eighteen months after the promulgation of the Statutes.

It is impossible to describe the delight with which this event was at last hailed by Russian society. "The opening of the New Courts," says the Address presented to Alexander II by the Municipality of St. Petersburg, "fills the hearts of all your faithful subjects with a joy which Russia has never felt except in the most glorious moments

<sup>1</sup> We have already seen how the independence of the Councils of the Bar was almost annihilated by the granting of the right of protest and appeal from their decisions, which to a considerable degree placed the Councils under the control of the High Courts.



of her historical existence." The press welcomed it as the dawn of a new era. All that was best in the country hastened to offer service in the new field of activity. Personal interest was put aside; men in distinguished and profitable positions left them in order to have the honour of joining the New Courts. The public fully believed in the sincerity of the Government's intention to carry out the exalted words of Alexander II, emblazoned in gold over the doors of the first New Court opened in St. Petersburg—"Let Justice and Mercy reign in the Courts."

Everyone thought, that in spite of a few ominous defects in the new reform, "things would right themselves later on" (a Russian saying), and there was no one who suspected the "honeymoon" of the new conditions to be so near its close as proved to be the case.

The first clouds appeared in about two months. On June 22nd, 1866, a Decree was edited by which the Governors of Provinces received the right to summon the judges and to require them to give an account of their proceedings. This humiliating decree made an unpleasant impression on the public, but they continued optimistic.

In August of the same year, in the Court of St. Petersburg, the editor of a progressive magazine was tried for publication of an article in which the Government perceived some offence to the nobility. He was acquitted. The Minister of the Interior, P. A. Valouieff, the bitterest enemy of the Press, reported this case to the Tsar, and suggested to him that the "irremovable" President of the Court should be dismissed without trial. It was only owing to the persuasion of the Minister of Justice, Zamiatin, who intimated to the Tsar the danger and inconsistency of such high-handed action just after the establishment of "irremovable judges," that the *congé* was not given.

Valouieff, however, on December 12th, 1866, obtained an alteration in the jurisdiction for delicts of the Press, and

this was the first blow to the stability of the Judicial Statutes.

In the same year a civil petty official was tried for the offence of striking his chief. The jury found that he was insane, and according to law the Court inflicted no punishment. Valouieff saw in this an undermining of authority, and insisted on the dismissal of Zamiatin. As his successor was appointed Count Palen, formerly sub-director of the Department of Police, who had never even served in the Ministry of Justice. "This nomination," wrote the famous reactionary Prince Meschersky, in his memoirs, "of a Count of the Baltic Provinces, a Lutheran, which was made by advice of the Chief of the Gendarmes, indicates a movement in opposition to the liberalism introduced into the life of the country by the new Statutes"; and a memoir from another pen runs thus: "Here is the first victory gained by the Bureaucracy over the New Courts—poor Russian justice!"

From this time onwards there passed not a single year which did not bring some fresh alteration in the Judicial Statutes. The independence and irremovability of the judges was reduced to a mere paper existence. The system of appointment of Justices of the Peace by election was replaced by nomination of the Crown. The competence of juries was limited. Special tribunals were created for the delict of the Press and for crimes by officials. Political offences were removed from the jurisdiction of the Courts and put into the hands of the Gendarmerie. Of the once magnificent structure of the Judicial Statutes only a mutilated ruin remained, broken and patched, disfigured with meaningless excrescences and unsightly holes.

But even in ruins they still suggested the progressive "Fundamental Principles" which had commanded the admiration not only of Russia but of Western Europe, and were now found to be at variance with the autocratic system under which Russia was governed.

The smoothing away of this discrepancy was entrusted by Alexander III to N. V. Mouravieff, who in 1894 appointed a special Commission for the radical revision of the Statutes. At the same time Mouravieff, nominated Minister of Justice, expurgated the Courts from all the spirit of the Judicial Statutes, and procured such a contingent of judges that even Von Plehve consented to trust them with political cases.

The Japanese war, followed by the storm of the revolution, checked for a time the work of destruction; but with the succeeding reaction it was resumed.

Everyone with the smallest sense of independence has either left or been expelled from the Bench. Last year (1910) the President of the Court at Varonij received a reprimand, and the Procureur of the same Court was dismissed on account of the acquittal of the members of the Committee of the Constitutional Democratic Party, who were accused of illegal conspiracy. The Procureur of the Court of Tchernigov was dismissed because he expressed his opinion that a certain election in which the reactionary party won was not fairly contested. The Judge of the city of Novorosisk was dismissed because he gave, as witness in a trial by court martial, evidence favourable to the accused. But the most striking instance was that of the Vice-President of the Court of Volgda. He had served thirty-five years, and was dismissed because he was on good terms (as was stated in the official discharge) with the members of the local Bar, and frequently received the thanks of the jury for his successful guidance at the assizes over which he presided. By this dismissal he was deprived of the pension which would have been the support of his old age and to which he would be entitled in just twenty-four days.

To replace these unworthy representatives of Justice men of a different type were chosen. In a certain city a newly appointed judge, shortly after his arrival was

prohibited by the committee from entering the local club, on account of his conduct. The same thing happened to the Procureur of the Court in another district.

It is reported of one judge that he refused to listen to the pleading of a female litigant, and when she insisted on being heard he struck her on the back with such violence that she fell forward in the Court. A judge in the Caucasus beat two villagers with a *nagaika* because when greeting him they omitted to take off their caps, and when he heard that they had made a complaint he came with the police, searched their houses and arrested them. Another judge is at this moment under trial for bribery.

Innumerable such cases could be cited from the official reports, and it would be strange if the cause of justice did not suffer in the hands of such administrators.

The preliminary inquiry on which the accusation is based is so carelessly conducted by the judges specially appointed for the purpose (*Juges d'Instruction*), that it has become a by-word; and during the last ten or fifteen years the assizes have seldom closed without a complaint from the jury on this head. "We feel it necessary" runs the declaration made by the jury of the February Assizes of the present year at Moscow to the Presiding Judge, "to draw your attention to the defects of the preliminary inquiry, which not only provoke irritation in our minds at the impossibility of discovering the truth, but have an adverse influence on the fair and dispassionate attitude the jury should take."

It may be safely asserted that the greater number of acquittals by juries in the Russian Courts, which is very high,<sup>1</sup> are due to the defectiveness of the preliminary inquiry.

The institution of the jury as representing the public in

<sup>1</sup> In the year 1908 in the Criminal Court of Moscow, out of 3,768 persons tried, more than half, i.e. 2,082, were acquitted.

cureurs and sometimes even by Presiding Judges, which had been at the beginning extremely respectful and amiable, became as time went on worse and worse. At the present time it assumes proportions quite unimaginable in Western Europe. The contemptuous insult with which they are treated has become, like the neglect shown in the preliminary inquiry, a cause of frequent complaint. Many instances could be given, but the most flagrant perhaps is that of the President of the Minsk Court who, on the acquittal of a man accused of theft, addressed the acquitted man in these words, "You are free; go and share your plunder with *them*" indicating the jury.

The attitude of the Bureaucracy towards the new Courts could not fail to affect the Bar. If, as in the case mentioned on a previous page, the resentment against the acquittal of a madman who struck his superior was such as to cause the dismissal of a Minister of Justice, it may easily be imagined with what feelings of irritation barristers were listened to when pleading for "criminals" of a similar kind, or still worse, journalists and political offenders. The bold and eloquent speeches in which they claimed justice and mercy for their clients, appealing to the sacred rights of liberty, and reciting the desperate conditions under which the people groaned, drew tears even from the Judges, while the public could not restrain their sympathy and approval. The Order held a high place in the public esteem, and the honourable title of "Defenders" was bestowed from the very outset upon its members, and is the term always used by the common people in Russia.

The Bureaucracy could not struggle with the Order on the ground of law, for the advocates never abused their right of free speech even when most passionately defending their clients; and it was difficult to find judges who would openly

convict innocent men merely to please the Government. They took the easier course therefore of issuing secret instructions to Presidents of the courts to cut short their speeches, and even to expel those unfavourably regarded by the Government Authorities from the audience. These instructions met with a ready response from some of the judges. Already in 1867 the President of the Moscow Court had thus expelled Prince Urousov, the eminent advocate who had defended many political cases. Since that time an incessant conflict has been carried on between Presiding Judges and "Defenders," but these conflicts have never been so keen and frequent as now, when the abrupt withdrawal from the Court of an advocate unable to endure the insolence of the Presiding Judge is no unusual occurrence.

The following quotation from a speech of the Presiding Judge of Assize to the jury will serve as an illustration of the judge's view of a barrister:—"Although advocates take the oath they forget it for the sake of their material interests. Be careful in your dealings with them, and never trust them, for they manipulate facts, ignoring those which are unfavourable to their clients. It is not the truth they are seeking, but to save the accused person and then to share the plunder with him. Remember that their eloquence has but one aim, to receive money." The complaint of the Council of the Bar about this speech was absolutely ignored by the Senate.

It is not surprising that to be on terms with the Order is quite sufficient ground for the dismissal of a Judge, as we have seen in the already cited case of the Judge in Vologda to whom the members of the local Bar (twenty persons) presented an address which runs as follows:—"During a number of years we, advocates of Vologda, have been meeting you in the exercise of your functions in the Criminal Court, and have felt satisfaction in the friendly

relations between us and yourself which clearly show that to you an advocate is not merely an unavoidable evil only to be tolerated in the Courts, but the necessary collaborator of the Tribunal in the exercise of justice. Only in such an attitude are the realisation of justice, and the safety of the accused, who entrusts us with the defence of his rights, possible. Your attitude to us is especially valuable now when a bitter attack is being made upon our Order. It is no secret to us that your relation with us is one of the causes of your enforced retirement from duties in the fulfilment of which you have sacrificed thirty-five years of your life. In these evil days, when we are always in peril of denouncement, when the independence and irremovability of Judges are reduced to a shadow, when the service of the law and the high ideals of the Judicial Statutes are replaced by servility and self-interest, your dismissal can easily be understood."

All these insults—the interruption of pleadings, expulsions from audience, and other manifestations of antagonism, failed to quench the ardour of the advocates in defending the rights of the accused, and a further step has been taken lately, a step which in the 'sixties would have been considered impossible. In 1909 a member of the St. Petersburg Bar, 'Guillerson, was condemned to eighteen months imprisonment for his speech in connection with the famous massacre in Biełostock, a speech in which the Authorities perceived political offence.

Until 1874 only three Councils of the Bar had been constituted, namely, in the St. Petersburg, Moscow, and Kharkoff Circuits. The constitution of the Councils in other Circuits was delayed by the judicial authorities. In that year an Imperial decree was issued by which any further extension of Councils of the Bar was stopped.<sup>1</sup> The decree gave as a reason for this that the existing

<sup>1</sup> During the Revolution five more Councils had been constituted and at the present time only six Circuits out of the fourteen are without Councils.

Councils of the Bar "had not satisfied expectations in the matter of supervision over the dignity and moral purity of the persons belonging to the Order." \* It is sufficient to glance at the practice of the High Courts in matters of discipline to see that "the dignity and moral purity of the Order" was a mere pretext.

Seventy-four persons convicted by the Council of St. Petersburg for violation of these virtues appealed to the High Court against the punishments imposed. Out of this number the appeals of thirty-five only were refused while the remaining thirty-nine had their punishments mitigated. Among these were four upon whom the severest sentence, namely, expulsion from the Bar, had been passed, and as their sentence also was commuted the Order was compelled to take them back. It has become quite an ordinary occurrence for an applicant who has been refused admission by one of the existing Councils to go to a Circuit where the functions of the Council were performed by the Court and there succeed in his object, the Courts taking into consideration in granting membership the formal eligibility only of the candidate, and having no regard to his moral character.

The real meaning of the lack of supervision complained of was that the Councils, quite reasonably and after fair examination into the circumstances, usually acquitted members of the Bar who had been complained of by the judges and officials of the Courts, with whom, as we have seen, they were in constant conflict. They were guilty also of the sin of admitting to the Order certain Judges and Procureurs who were unfavourably viewed by the Authorities.

It was in the year 1874, simultaneously with the publication of the Decree, that the new body of advocates was created, namely the "private attorneys," by which the Order was considerably affected. Anyone can belong to this body who has obtained a certificate from the Governor of the



province that he is politically sound, and one from the Court that he has sufficient knowledge of law to conduct cases. Neither a degree in law nor any particular moral standing are required. The private attorneys have no organisation, and are entirely dependent on the Court, which exercises over them disciplinary powers and at any moment can withdraw its certificate. The whole number of private attorneys in 1910 was 5,499. All writers competent to express an opinion (judges, advocates, etc.), concur in stating that in mental and moral standing they mostly resemble the attorneys of the pre-reform "Old Courts," and according to these authorities they are not over punctilious as to the means they employ in order to gain their ends. They are not only a source of humiliation to the Order, through the confusion which is caused in the minds of the ignorant public, but they bring into it also by their unscrupulous competition a certain demoralisation.

It remains to mention the Imperial Decree of 1888, by which Jews were forbidden to join the Order, unless by special permission from the Minister of Justice. Since that time until the revolution, not a single permission was given. During the short period of freedom many Jews gained admission to the Order, but now the law is again rigorously enforced.

#### IV.

So far the external history of the Russian Bar has been followed. A few words must be said about its internal constitution.

Notwithstanding imperfections in the law relating to the Bar, and the struggles against the obstacles placed in its way by the Courts, the Order succeeded in developing its internal organisation in the three Circuits where it had autonomy.

Its first care was to organise a school of advocates. As stated earlier, the Statutes chiefly regarded service in the

Courts in the light of a school, the extension of the right of admission to the Bar being intended to apply to those persons who actually "assisted" their patrons, and in this way pursued a practical study of law. For this reason they did not permit independent practice to "assistants"; and on the other hand advocates were entitled to employ as their assistants men who had not taken a university degree in law, and therefore could never obtain membership of the Bar. What really happened was that, on the opening of the New Courts, hundreds of young university men, attracted by the glamour surrounding the Order, besieged the advocates, who, though not requiring them as "assistants," consented to receive the ardent aspirants, ten or fifteen of whom was not an unusual number to find attached to an eminent lawyer. As very few advocates required actual assistants, the relation between the latter and their patrons became merely formal, and the *stagiaires* got little opportunity of learning law by practice.

It became evident that there was not a sufficient number of lawyers in the Courts desirous of joining the Bar, and that its future members would be principally the assistants.

The Council of the St. Petersburg Bar in 1869 ordered its members to exclude those assistants who were without a degree in law, and to accept as assistants such persons only as had been declared satisfactory as to moral standing after an Inquiry conducted by the Council itself. Thus the Council, by subjecting to its own control both the acceptance of assistants and the sphere of their activity in that capacity, created an actual "*stage*" and repaired the omission of the Statutes.

To provide a means for the serious study of law for those assistants who were only formally bound to their patrons, the Council established "Conferences," which still exist. At these conferences the assistants, under the guidance of a competent barrister nominated by the Council, make

reports and discuss legal subjects selected by themselves. In a short time the assistants formed themselves into a semi-autonomous body, to which the Council delegated some of its own functions, reserving to itself only the supreme control and guidance. This body holds in its hands the admission of new members, and the Council simply ratifies its decisions. It controls the conduct of its members, organises the gratuitous defence of accused persons in towns where there are no advocates, and establishes free consultations.<sup>1</sup> A similar organisation was established in Moscow, and lately in other big towns where there are Councils.

Unfortunately the Councils met with persistent opposition in their organisation of the assistants from the High Court, which taking refuge in the silence of the Statutes in this matter, denied the Councils any power over the assistants.

The law on private attorneys has a specially unfavourable influence on the development of the "*stage*," for it enables assistants to practice independently of their patrons by obtaining the certificates of private attorneys. As these certificates are given by the Courts which exercise disciplinary powers over private attorneys, the assistants in the capacity of private attorneys are placed under two conflicting systems of discipline, neither of which accomplishes its object. The Court has only formal control over such assistants, and takes no cognisance of their moral standing, while the Councils are unable to punish their delinquencies, because the delinquent practices as a private attorney holding his certificate from the Court. The bond between the Order and the assistants became weaker under this influence. In

<sup>1</sup> In 1910, in the suburbs of St. Petersburg, no fewer than 32,767 persons availed themselves of these consultations, 12,217 of these receiving advice gratis, while the remainder contributed the small sum of £763, of which £706 spent on the maintenance of eleven offices.

most of the provincial towns no organisation exists at all, and the assistants are entirely left to their own devices.<sup>1</sup>

The question of the admission of women to the Order arose for the first time in 1908, when the Council of the Bar of Moscow sanctioned the admission of three ladies as assistants. Their example was followed by other Councils, but recognition was entirely refused by the High Court.

The organisation of free legal advice also drew the attention of the Russian Bar. Until lately no fewer than sixty towns had organised free consultations. In 1909, after forty years of existence, the Senate, whose function it is to interpret the law, found that such organisations are illegal. Although the Minister of Justice, in his report to the Duma, paid a tribute to these organisations, and recognised that they had "gained the confidence of the population," the Presidents of some of the Courts hastened to suppress them.

Rules of etiquette similar to those of the Bars of Western Europe were adopted by the Order—confraternity between the members; interchange of courtesies; mutual disclosure of documents relating to cases by opposing barristers, etc. Advertisement and solicitation of every kind, as well as the establishment of law bureaux, are strictly prohibited. Certain kinds of commerce and agencies are considered incompatible with the dignity of the Order.

As has been said the Statutes do not limit the profession to pleading in the Courts, but allow a member of the Bar to conduct the execution of judgments. Owing to this the Order contains a certain number of members who make a speciality of this branch—recovery of debts, liquidation in bankruptcy, etc., occupations which do not require either

<sup>1</sup> An inquiry made among the assistants of St. Petersburg and Moscow, 1907-10 revealed that a considerable number of them have gradually assumed only a nominal connection with the legal profession, earning their livelihood by other means; agency, commerce, clerkship, teaching, lecturing in the Universities, &c. In St. Petersburg only forty-three per cent. of assistants actually work under the control of their patrons, in Moscow the percentage is smaller yet, only thirty-seven.

knowledge or talent, but only a special kind of cleverness. They never plead in the Courts, and by various means avoid defence by nomination when their turn comes, and taking no interest in the life of the Order only help to lower its prestige.

The Order may, however, be proud that from the very beginning and up to the present date it has always counted among its members eminent men of learning, orators, and men of distinction. Among these may be mentioned S. A. Mouromtzeff, the first President of the first Duma, under whose high authority all parties inclined with respect.

The repression of the last few years has engendered in the Order a new sense of unity and a determination to concentrate their forces in the fight for their independence. The general meeting of the Moscow Bar, on March 7, 1910, was marked by extraordinary emotion, and the multitude of members present, after hearing the ardent speeches denouncing the increasing attacks on their liberties, instructed the Council to take immediate steps to strengthen the organisation. At the present time the Russian Bar is on the eve of reorganisation. The projected change threatens to deprive it of all independence and to put it entirely into the hands of the Minister of Justice. Whether the reactionary flood will submerge the independence of the Bar as it has already submerged that of the Courts, or whether it has reached its highest point and the ebb will begin, the near future will show.

L. P. RASTORGOUEFF.

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## VI.—CURRENT NOTES ON INTERNATIONAL LAW.

### **Berlin Society of Comparative Jurisprudence.**

THE Vereinigung für Vergleichende Rechtswissenschaft und Volkswirtschaftslehre zu Berlin has held at Heidelberg, in September, its first Special Conference. This body is now some seven years old, and draws members from all parts of the world: it publishes a monthly paper (*Blätter*) of considerable scientific value, and a very exhaustive triennial digest of the general legislation of the world, while meetings are held regularly in Berlin. It had not, however, previously organised a general conference, and it is a matter for surprise and congratulation that the arrangements were all so well thought out and worked so excellently. This fortunate result was due mainly to the President, Dr. Felix Meyer, Judge of the Royal Prussian Court of Appeal, and the Hon. Sec., Dr. von Levinski. Heidelberg is of course well accustomed to the meeting of learned congresses; the University put its buildings at the disposal of the Assembly for meetings, whilst the Town Hall was available for social gatherings. The festivities also included visits, on the invitation of the City and Grand-ducal Government respectively, to Mannheim and Baden-Baden. The City of Mannheim kindly provided a first-rate operatic performance, and the town of Heidelberg gave a water-party, with magnificent illuminations of the castle and bridge.

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On the scientific side, the proceedings were of uncommon interest. It was remarked that really good papers, embodying new ideas, were the rule and not the exception. Six sections were formed, for the discussion of various fields of the wide area covered by the society's scope. To enumerate the interesting papers read would be to print the

programme. It must suffice to say that universal attention was paid to the following papers. Dr. Neukampf (Judge of the Imperial Appeal Court) contributed one on the Nationality of Juristic Persons. He urged that the recommendation of the Institute of International Law, making the law of the *siège social* determine the nationality of the corporation, should be modified so as to substitute the law of the place of incorporation. Discussion on this was animated, and a decision was not reached. Professor Heinsheimer (Heidelberg)—who contributed powerful aid in making the Congress a success—read a paper on Private Rights in Social Conflicts, which was very thorough, and much appreciated. Professors Jitta (Amsterdam) and Tilsch (Prague) put before their audience some fresh and illuminative ideas on Private International law, and a galaxy of talent treated the never-ending problem of Foreign Judgments. Dr. Meyer himself spoke on the Unification of Bills of Exchange law. Professors Hollatz, Pappafava and Pranzataro discussed the Law of Aviation; they did not, however, refer to the theory of Dr. Lycklama à Nijeholt that the doctrine that “the air is free” did not mean with the Romans that the air-space is free to all comers, but that the physical material of the atmosphere is insusceptible of appropriation by anyone, and can be drawn off at will by others.

Constitutional Law received much attention, Professor Tambaro (Naples) speaking of Proportional Representation, and Dr. J. Zergenyi (Sopron) on Hungarian Constitutionalism compared with International Vwrechtspflege Vwgerichtsbarkint. Dr. Horn (Paris) spoke of International Vormandschaftsrecht. Great interest was taken in two papers by Professor Peritch (Belgrade), one expounding Servian Divorce law, and the other treating of the Servian joint family or Zadruga. This institution so took the fancy of the Conference, that it referred to itself thenceforward in confidential moments as *dér ganz Zadruga!* Dr. Rusztem

Vambéry (Pesth) gave a paper on the Protection of the Lower Classes in Criminal Jurisprudence, demonstrating that socialism would have none but criminal process available, and would use it with crushing force on the working classes,

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The Baden Government, the German Ministries of Justice and Colonial Affairs, the Hungarian Ministries of Justice and Commerce, the Société de Législation Comparée (Paris), the Austrian Union of Notaries, and the International Law Association, were all officially represented—the last named, by Dr. P. Govare, Professor Jitta, Mr. A. Kuhn, and Dr. Th. Baty. Among others present were Their Excellencies Ministers P. von Rheinbaben, von König and Simons, Professor von Martitz, the Marquis d'Olivart, Appeal Judges Simonson and Neukampf, and Mr. Dove.

### Italian Aggression.

If anything is more to be regretted than the Italian descent on Tripoli, it is the lukewarm attitude of the European press towards that international crime. Almost all the leading London newspapers appear to accept the doctrine that if any property is useful for the development of a nation, it may rightly help itself to it. It seems to be considered that every great country has a right to grow greater, and to pursue its development by whatever means, regardless of the rights of others. Expansion is the only duty: weakness the only crime. This recalls the doctrine of *Hautefeuille*, ridiculed by Harcourt and universally condemned by British publicists, that a nation has the right to repudiate its solemn engagements when they become inconsistent with its development and vital interests: *i.e.*, when they prove inconvenient. It is the old story of Cyrus and the coats: the preference of suitability to justice. In an



earlier and saner age, a vigorous and thriving community was held to exhibit its virtues best by making the most of the resources which it had, and not by appropriating those of its neighbours. To have created a cleaner and an honester Italy would have been a more striking exhibition of Italian national progressiveness than the stealing of a convalescent's province. If Adowa left a stain, it is not to be wiped out by big-gun practice against obsolete forts. The real stain of Adowa was the arrogance which preceded it, and the greedy demands made upon the Abyssinian Emperor. Then, as now, Europe was silent. The Emperor's poignant appeal to Queen Victoria elicited a cold diplomatic reply, in which he was informed that Italy was a strong nation, and that it would be best to submit. Adowa was the outcome.

### War Questions.

It will have been observed that both Italy and Turkey have more or less formally declared an intention of regulating their conduct in prize matters by the Declaration of London. Turkey is not a party to that instrument, and it is as yet unratified by any of its signatories—the Naval Prize Bill being still unadopted by either branch of the British Legislature. At present few questions of prize have occurred. Turkey was swift to follow the lead of the Declaration, and to declare corn contraband. Russia, having corn-exporting interests which would be interfered with in at the Bosphorus, drew her attention to the fact that corn-cargoes must be destined for the enemy's fleet or armies before they can be contraband under that historic document—and, so far, Turkey has refrained from rejoicing that such is the destination she supposes these to have. She has, however, declared her intention of regarding as contraband grain destined to any of the Italian ports. These are selected

on the ground of their being fortified : they comprise such commercial ports as Syracuse and Brindisi. The incident strongly suggests that a Power at war with Britain would be at liberty to include in a similar list Glasgow, Newcastle and Liverpool. It is of course not conclusive that the ports of destination are not military or naval : and it is not even conclusive that the apparent destination is not Italian. The extinction of lights on the belligerent coasts is an unexceptionable but drastic measure. So would be the expulsion of hostile aliens, and though that is an extreme course it might prove advisable if popular excitement should make their protection difficult.

### Egypt in War.

Presumably a vassal State is not necessarily affected by the wars of its suzerain. The case of *The Ionian Ships* (Spinks, p. 74) shows that this is the view of the English Courts. In that case, Ionian ships had been captured during the Crimean War, on the ground of trading with the Russian enemy. It was held that the Ionian Islands, though under the protection, and virtually under the sovereignty, of the United Kingdom, were not *ipso facto* at war with Russia. That would have required a special interposition of the British Government. It was thus admitted that the suzerain had the power, if it chose to exercise it, of making its vassal a party to its wars. If Turkey should call on the assistance of Egypt, it would seem to follow that Egypt must either disclaim the sovereignty of the Sultan, or else admit that she herself is at war with Italy. Even apart from that, and as things stand at present, can it be consistent with his allegiance to the Sultan for the Khedive to deny him the assistance which a neutral is bound to refuse to a belligerent? Could the Khedive fire on the warships of his suzerain if they sought asylum at Alexandria, or sought a base at Port

Said? Could he hinder the Sultan's subjects from proceeding to his aid? The question is academic; for the anomalous position of Turkey is such that ordinary principles are set aside. The suzerainty over Egypt is little but a name. Yet circumstances might arise in which an English refusal to permit Egypt to fulfil the obligations of a vassal to its suzerain might arouse a dangerous feeling throughout the Mohammedan world.

### Declaration of War.

It is said that Italy has not even ratified the Hague Conventions of 1907. In that case, her punctilious and hypocritical observance of Article I of the Third Convention was a work of supererogation. That Article provides—and it is a very useless provision—that war must not be commenced without a formal declaration. But since it admits that a conditional declaration may be made, which will automatically take effect if certain demands are not complied with, and implies that no space of time need intervene between declaration and overt hostilities, it is still open to a nation to present a sudden ultimatum and to commence practically simultaneous warfare. As for the string of Italian complaints which formed the substance of the ultimatum, they are nowhere treated seriously. They are precisely like the grievances of the Wolf against the Lamb. Such cases of injury to individuals by individuals can only in the last resort involve complaint against the State. Even then, it is rare that responsibility is recognised: and when it is, it is discharged by a small money payment. Such claims on account of injury to subjects are pre-eminently suitable for reference to arbitration. Perhaps if the Peace Congress had been sitting at Rome in October, instead of being prevented from meeting there by cholera, the Italian Government might have referred the dispute to them!

### Morocco.

The Moroccan imbroglio dates from many years back. In 1721 the first British treaty with Morocco was signed by the representatives of George I and of the King of Fez, Mequinez, Morocco, and all the West of Africa, establishing the principle that English offenders and English suits were to be tried by the Moroccan Sovereign in person. Incidentally, it secures an asylum in Moroccan ports for English ships flying from an enemy, together with liberty to bring English prizes into Moroccan waters: and it sets up a "forty hours' rule" in their favour, when hostile ships are lying off the Morocco coast. This gave place in 1750 to a *régime* of capitulations, the English Consul being associated with the Kaid for the trial of causes. Yet the Articles of 1721 were expressly re-affirmed: and in a Treaty of 1760 we find both systems side by side—Article 6 apparently providing for trial by the Emperor, and Article 21 for trial by the joint tribunal established in 1750. It is possible that these regulations respectively regarded civil and criminal affairs: in the Treaty of 1791 they are placed in juxtaposition (Articles 7 and 8), and Article 8 here clearly refers to penal law. Article 7 was, indeed, not ratified by the Emperor. In 1801, we get a considerable step towards extra-territorialism: disputes between Moors and English are to be referred to the English Consul, who is to decide according to Moorish law. A criminal complaint, however, must still be heard by the Emperor. In 1824 there was some check to the process: the Kaid and the Chief Judge were associated with the Consul, and an appeal was instituted to the Emperor. The direct reference to the Emperor was limited to cases of "serious personal injury." Indeed, the Consul was not made sole judge in cases against British subjects until 1856.

It was not, however, the mere introduction of Consular Courts for complaints against English and other foreigners that was the true source of the Moroccan difficulty. That lay in the vast increase of the practice of "protection," by which foreign powers withdrew their own subjects from the jurisdiction of the Emperor, and, what was more, from his financial demands. By the Treaty of 1750 it was provided that "no English whatever, or any of their servants (though not English), shall be liable to pay the . . . poll-tax." In 1751, this was extended to "any other tax." This provision was continued in 1791, and in 1801 it was extended to the Consul's "dependants," but not conceded to the servants of other English (unless implicitly by a confirmatory clause (Art. 38), or on the footing of the most favoured nation). In 1856, the privilege was allowed to the Diplomatic Agent; but only in a very restricted form to the newly instituted Consuls at the ports. These reasonable measures of exemption were taken advantage of in the most audacious manner, to cover, not only the brokers and agents, as well as the interpreters and domestics, of the Missions, but the agents of simple merchants of foreign nationality. The "protected" character had even become hereditary. Sir J. Drummond Hay, the British Minister, declared that the system had attained such proportions as to threaten to render all government impossible. The Italians were the worst offenders, and then the French. Instead of a few privileged domestics in consulates, the Emperor saw a horde of adopted quasi-aliens permeating his whole dominions. The outcome of this was the Tangier Conference of the Powers, which failed to agree, and removed to Madrid in 1880. Here a Convention was adopted, but it stereotyped the existing abuses (though it made *protégés* subject to a tax at an agreed rate). The root of the difficulty was not touched; and the famous Algeçiras Conference of 1905 became necessary. Of this we said in

May, 1906, that its decisions amounted to a partition of the skin of the still unslain Moroccan bear, and we gravely questioned their usefulness. Its principal work was to establish an international military police under French and Spanish officers and Swiss control, in the eight coastal towns. It had nothing to say as to the policing of Fez: and we all know that States are in the frequent (if bad) habit of sending gunboats to protect their interests in perfectly policed ports, such as we must presume is Agadir. France, invoked by the Emperor of Morocco, was under no obligation in law to refrain from going to Fez. Germany was under no obligation to keep the *Panther* and *Berlin* away from Agadir. The truth is, that there are only two ways of dealing with a disturbed country. One is to leave it alone. The other is for a single nation, or a close alliance, to conquer it. Dual controls—multiple interventions—are certain to do more harm than good. The case of Mexico is in many ways like that of Morocco. The futile triple intervention of France, Britain, and Spain produced no effect, except to keep revolt smouldering. The French occupation did produce a temporary effect: but the complete withdrawal of all foreign interference resulted in the prosperous Mexico of our own time.

TH. B.

## VII.—NOTES ON RECENT CASES (ENGLISH).

FOR the recovery of penalties for the possession of unsound meat intended for sale as food for man, sect. 253 of the Public Health Act 1875 limits a right to proceed to either a person aggrieved or to the local authority, unless some part of the Act itself or the leave of the Attorney-General, extends the right to another person. This would practically exclude from interference a private individual who had suffered no injury; and in *Dodd v. Pearson* (L. R. [1911], 2 K. B. 383), the Court was right in

allowing the appeal of a butcher who, under proceedings initiated by the superintendent of police of the district, without the authority of the Attorney-General, had been convicted by justices of having on his premises meat coming within the prohibition of the Act. But it was a not unreasonable contention of the superintendent that, as the rural council had refrained from acting, he was a party aggrieved by force of his duty to protect the district from mischiefs arising from violations of the law. When the next amendment of the Act is proposed, it would be well to add the police to the persons empowered to proceed on their own authority.

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It is true that in *Giebler v. Manning* (L. R. [1906], 1 K. B. 709, noted in our issue of August, 1906, Vol. XXXI, No. 341, page 481), it was held to be in the power of a private person to prosecute even in the absence of authority. But this was a case under the Public Health (London) Act 1891, which contains no prohibition like that in sect. 253 of the Act of 1875. The Lord Chief Justice, who presided in this as well as in the case above, said here that, "Having regard to the object of the statute, the protection of the public against the offering of unsound meat for sale, I think that if it had been intended to limit a right of proceeding, words would have been introduced taking away from private persons the right to lay information under the section."

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*Salt v. Tomlinson* (L. R. [1911], 2 K. B. 391) is another case under the Public Health Acts, and is of importance, for as the unsound meat had been sold and transferred to the premises of the purchaser, the Act of 1875 could not by itself apply. But sect. 28 of the Amendment Act 1890 provides that the Act of 1875 shall extend and apply, not only to meat, but to all articles intended for man's food, and not only to such as are prepared or deposited for sale, but to all that are sold. The Lord Chief Justice says in

this case, in language of the same spirit as that quoted above, that, having regard to the object of this legislation, it was the intention of the Legislature to hold the seller still liable notwithstanding the sale. .•

The circumstances of *Ranson v. Platt* (L. R. [1911], 2 K. B. 291) are probably without a parallel all through. It is remarkable that a warehouseman who has become bailee of property should, on a hostile claim, accompany, without any notice to his bailor, the rival claimant to a police court, and from an imperfect statement of the whole facts allow an order to be obtained, under sect. 40 of the Police Courts Act 1839, for the delivery up of the goods. It was remarkable also that he should, to cover his charges, purchase part of the goods from the new claimant. It is not less remarkable that the Divisional Court held him to be justified. For he had failed in his duty to protect the property intrusted to him, in not giving instant notice to the bailor of the adverse claim, and in not having put before the magistrate the full case of the bailor. And further, notwithstanding the magistrate's order he was under no obligation to part with the goods till his own claim for warehousing was met. And that he should have satisfied his claim by purchase of goods so irregularly transferred was unwise as well as remarkable. Under such circumstances the magistrate's order was held by the Court of Appeal to be no protection to him and the bailor's appeal was allowed. In the old days of special pleading it would have been a case of much interest.

The sections relating to party walls in the London Building Act 1894 are the lineal descendants through many intermediate Acts of sections on the same subject in 19 Chas. II, an Act for rebuilding the City of London "to the end that great and outrageous fires may be



obviated." But notwithstanding the two hundred and twenty-seven years that separated the two enactments, the Court finds in *London, Gloucestershire and North Hants Dairy Company v. Morley and Lanceley* (L. R. [1911], 2 K. B. 257) that "the difficulty is to discover what is the natural meaning of the language" in the modern Act. And the decision meets the difficulty in the best way by reading into sect. 58 the words "and of its height" after the words "for such part of its length."

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Another party wall case is *Minturn v. Barry* (L. R. [1911], 2 K. B. 265). It is more than probable, when such an existing structure as a garden wall is utilised as portion of a party wall between two buildings subsequently erected, that the rooms of which it forms one side may suffer from dampness. The Court do not, as a matter of law, agree with the County Court judge from whose decision the case was an appeal, that no amount of damp could make a wall defective assuming it was not defective for the purpose for which it was built. Practically such questions depend upon the report of a surveyor appointed under sect. 91 of the London Building Act 1894.

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As the words at the beginning of sect. 25 of the Summary Jurisdiction Act 1848 (11 & 12 Vict., c. 43), that "where Justices shall adjudge a defendant to be Imprisoned and such Defendant shall then be in Prison undergoing Imprisonment," have been so interpreted as to mean that a man is in prison and undergoing imprisonment the moment sentence is pronounced because he has been deprived of his liberty before he has left the dock, the rest of the section that justices may order imprisonment for another offence to commence "at the expiration of the Imprisonment to which the Defendant shall have been previously sentenced," is plain enough. But the interpretation does not con-

vincingly extend to consecutive sentences on more than two offences, for the defendant cannot well be in prison for the second offence before the expiry of the sentence on the first. *Rex v. Martin* (L. R. [1911], 2 K. B. 450), will therefore cause satisfaction to the criminal classes, for the defendant concerned had astutely pleaded guilty to six charges and had been adjudged six consecutive sentences, but the Court have relieved him of all but the first two. The section is not very clear, but the decision does not perhaps quite accord with the intention of the Legislature.

T. J. B.

There can be no doubt but that *Salomon v. Salomon* (L. R. [1897], A. C. 22) was, like *Derry v. Peck* (L. R. [1889], 14 App. Cas. 337), a perfectly good decision in point of law. Whether it was equally good in point of business is another matter. As we know, it has been found necessary to alter by legislation the rule laid down in *Derry v. Peck* (*supra*) as regards representations made by company promoters. Many lawyers and business men are of opinion that no harm would be done if the rule in *Salomon v. Salomon* (*supra*) were altered by legislation too.

Thus, in *Attorney-General for Canada v. Standard Trust Company of New York* (L. R. [1911], A. C. 498), a syndicate of four persons obtained a Quebec Act for incorporating a railway company, the Act enabling them to purchase another railway. The four members of the syndicate took all the shares in the company and as private individuals bought the other railway. Then they sold the railway to the company, consisting of themselves, paying for it by the sums they subscribed for the shares of the company and taking credit for the balance. Subsequently the company became insolvent and its undertakings were sold. The four persons who had engineered the whole business then claimed against the proceeds of sale, as creditors for the

unpaid balance of the price of the railway sold by them to the company, and the claim was allowed.

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It was alleged on behalf of the unsecured creditors of the company that the railway had been sold to the company at a gross over-valuation. This view was adopted by one only of the several judges who heard the case. But, as Viscount Haldane pointed out in delivering the judgment of the Privy Council, on the principle of *Salomon v. Salomon* (*supra*), this did not matter, since the purchasers were fully aware of all the facts. From a business point of view it would seem to us that the important question was, whether the persons giving credit to the company were aware of all the facts. Had they known that the property sold to the company was of no intrinsic value, and that the company had purchased it for say £500,000, for which it had given a mortgage, would they as sane men have given the company credit?

We all know that the parties to an action are not entitled to obtain the evidence of their opponents by way of answers to interrogations. But what is evidence? That was the question raised in *Nash v. Layton* (L. R. [1911], 2 Ch. 71). There the defence raised by the borrower's trustee to a claim of debt was, that the plaintiff was an unregistered money-lender. To support this contention, the defendant interrogated the plaintiff as to the various transactions in the way of loans which he had had within some time previous to his loan to the defendant's predecessor in title. Joyce, J., and Fletcher Moulton, L.J., held that this amounted to asking the plaintiff to supply evidence that he was a money-lender. Surely the transactions inquired about were not the evidence, *i.e.*, the testimony of witnesses, which would prove the plaintiff to be a money-lender, but the facts which would make him a money-lender? Those were the very facts which were in

dispute. At the same time, whether the Court in its discretion should allow (as the majority of the Court of Appeal did) such interrogations, without any evidence to show that there was reason to believe the facts asked for would support the defence, is another question.

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The *London and North Western Railway Company v. Howley Park Coal and Cannel Company* (L. R. [1911], 2 Ch. 97) settles, in our opinion decisively, a point of great importance. As everyone knows, the Railways Clauses Consolidation Act 1845 enacts that if a railway company desire to prevent the working of minerals under their line or within forty yards of it they must purchase the minerals. What is the law as to support from the minerals outside the forty yards' limit? In *Manchester Corporation v. New Moss Colliery Company Limited* (L. R. [1908], A. C. 117) it was decided by the House of Lords that, in cases coming within the Waterworks Clauses Act 1847, a waterworks company had the ordinary Common-law right of support, without purchase of or compensation for the minerals necessary for support. But that Act contained words reserving the Common-law rights not contained in the Railways Clauses Consolidation Act 1845. Nevertheless, the Court of Appeal has held that those Common-law rights not being expressly taken away, remain in the railway company as they would in any other owner.

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*Burghes v. Attorney-General* (L. R. [1911], 2 Ch. 139) created quite an excitement in political circles. One would have imagined from the manner in which some of the newspapers dealt with it that its practical effect was to repeal the provisions as to the lands taxes in the Finance (1909-10) Act 1910. However, its operation is somewhat more limited than that. In fact, it is so limited that it probably was hardly worth the expense of an action except for this very important lesson which it teaches revenue officials—namely, that they are not omnipotent as they are inclined to think,

but are just like other people, subject to the control of the law and of the Law Courts.

*Soloman v. Attenborough* (L. R. [1911], 2 Ch. 159) is another decision on the difficult question—when does a person appointed by a will executor and trustee cease to be an executor and become a trustee? There, two persons had been appointed executors and trustees. Fourteen years after the testator's death, when all his debts and legacies had been paid and nothing remained to be done but realise part of the estate and distribute it, one of the two persons secretly pawned plate, part of the estate, and made away with the proceeds. If he was at that time executor, the pawnbroker had a good lien for the money advanced; if he was a trustee, he had not, since one trustee cannot give a good title to a purchaser for value of trust property vested in himself and a co-trustee. Joyce, J., held that the pledger was an executor and that, accordingly, the pawnbroker was entitled to retain the plate till it was redeemed. It is clear that a person appointed merely executor never by lapse of time or exhaustion of duties becomes a trustee. (*In re Mackay*, L. R. [1906], 1 Ch. 25, at pp. 30 and 31.) But where he is appointed both executor and trustee he becomes a trustee so soon as his duties as executor are fully discharged. (*Ibid.*) The difficulty is to say when those duties are fully discharged, and all that he has to do in the future are duties of a trustee.

Some appeals, as we have had frequent occasion to remark, are perfectly astounding. A new example of the truth of this is *Fauntleroy v. Beebe* (L. R. [1911], 2 Ch. 257). We should have thought that, if anything was finally settled as to conversion, it was that an order of the Court made within its jurisdiction directing the sale of land, converts the land into money from the date of the order. Yet, when Warrington, J., decided this in the

above case, there was an appeal: and counsel for the appellant actually, as the Master of the Rolls said, presented the question as one of difficulty and importance. As since the decision of Hall, V.C., in *Arnold v. Dixon* (L. R. 19 Eq. 113), in 1874, there has been a series of decisions on the point, none of which has ever till now been doubted, this was a sufficiently bold statement.

In *In re Ravensworth, Ravensworth v. Tindale* (L. R. [1905], 2 Ch. 1) the Court of Appeal held, that where a testator bequeaths to each of his servants "a year's wages," this applies only to servants who are hired by the year. In commenting on that decision (*Law Magazine and Review*, Vol. XXX, p. 489), we said, that while Joyce, J., very unwillingly held this as being bound by authority, the majority of the Court of Appeal seemed to think it was a very proper decision. We asked, when would judges learn that the proper mode of interpreting a will is to read it in the sense a plain man would read it? "Whether," we said, "a servant not hired by the year can have yearly wages is a nice point for logicians and other useful persons, but probably the point never troubled the mind of anybody used to treat affairs in a business-like way."

The Court of Appeal seems now to be coming round to the opinion we then expressed. In *In re Earl of Sheffield, Ryde v. Bristow* (L. R. [1911], 2 Ch. 267), a testator bequeathed to each of his "indoor and outdoor servants" . . . . "the amount of one year's wages," and the Court, "distinguishing" between this case and *In re Ravensworth* (*supra*), held that all indoor and outdoor servants, whether hired or paid weekly, monthly or yearly, came within the bequest. None of their lordships concealed the opinion that, though perhaps they were bound by *In re Ravensworth* (*supra*), they would follow it with very great reluctance.

J. A. S.

## SCOTCH CASES.

In the *Kilmarnock Theatre Co. Ltd. (in liquidation) v. Buchanan & Ors.*, 48 S. L. R. 547, the defenders being successful were found entitled to costs. The action had been raised by the Company and its liquidators. The defenders moved the Court to decern against the liquidators personally for the costs. But the Court refused and issued decree in the following form:—  
 “Decern for payment against Alexander Mitchell, Chartered Accountant, Glasgow, and James Robert Mackay, Chartered Accountant there, the liquidators of the Kilmarnock Theatre Company Ltd.” The defenders’ motion to have the word “personally” inserted after the names of the liquidators would mean that the liquidators had improperly raised and carried on the litigation, and would have to pay the costs out of their own pockets without recourse against the assets of the liquidation, but the Court were of opinion that no grounds had been stated to justify such treatment of the liquidators. It was, however, clearly laid down, and hence the importance of the case, that the effect of the simple decree which was pronounced would be to involve the liquidators in personal liability in the event of their not having in hand assets of the Company sufficient to pay the defenders’ costs.

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The case of *Todd’s Trustee v. Todd* ([1911], 2 S. L. T. 172), decided last month in the Inner House of the Court of Session, deals with an important and interesting question of International law on the subject of bankruptcy. William Todd had been adjudicated bankrupt in England, and his trustee Mr. F. S. Salaman, raised an action in Scotland to have it declared that a contingent interest which William Todd had in his deceased father’s estate passed to the pursuer as his trustee. The bankrupt was entitled to a

share of his father's estate on his attaining 25 years of age, which he would not do till 1914. This estate in expectancy or *spes successionis* would, it has been well settled, not pass to a trustee in a Scottish sequestration, the principle on which this is founded being that the trustee cannot take anything which is not attachable by legal diligence. A *spes successionis* cannot be attached by legal diligence, it cannot be arrested, poinded or got at by creditors in any way till it falls in to the bankrupt. But the question in Todd's case was narrower than that. Briefly, it was whether Todd's interest in his father's estate had been transferred by the Bankruptcy Act of 1883 to Mr. Salaman, that being the statute which gave him his title and under which he was acting. It was argued that as Todd was a domiciled Scotchman the bankruptcy order against him in England had been incompetently pronounced; but the Scottish Court declined to consider this, holding that the adjudication order of the High Court of Justice in England must be given effect to till set aside in that Court. Looking, therefore, at the main question, the Act of 1883 defines the property of the bankrupt which is vested in his trustee as including every description of estate, interest and profit present and future, vested or contingent. The Court looked at this provision in the same way as the House of Lords did in the well-known case of *Galbraith v. Grimshaw*, and stated the question thus:—Was the right and interest one which the bankrupt could assign to the trustee or anybody else? If the bankrupt could have assigned it, then it was assigned to the trustee by Act of Parliament. If he could not have assigned it the trustee would not get it. The Court ruled that though a *spes successionis* could not be attached by diligence it was a saleable thing, and as it might be assigned it fell to the trustee by the terms of the Act of 1883. This opinion, which overturned the judgment of the Lord Ordinary, lays



down a broad and important distinction between the bankruptcy law of the two countries regarding the contingent interests of bankrupts in testamentary estates.

Judicial proceedings relating to the custody of children are awkward and difficult matters to handle, and on that account solicitors consulted about such questions should consider well the advisability of an extra-judicial arrangement. Efforts in that direction, however, having failed, the husband in *Petition Robertson* ([1911], 2 S. L. T. 201) applied to the Court to grant warrant to messengers to search for and take his child into their custody and deliver to him. The spouses had been judicially separated, and it was averred that the mother was contemplating going abroad, in which case the husband would in all probability lose trace of her and the child. The Court pronounced interim interdict against the removal of the child from the jurisdiction, but were of opinion that a summary order authorising a messenger-at-arms to take the child, which was only two years old, from his mother could not be pronounced.

Under the Scottish Law Agents Act, a solicitor in a litigation is entitled to a charging order on the fund recovered. An application of this privilege to limited companies is to be found in *Philip v. Wilson (Liquidator of Bay Island Slate Syndicate Ltd.)* 48 S. L. R. 947. The pursuer had conducted an action in Scotland on behalf of the Syndicate, which was a company registered in England. The Syndicate were successful in getting decree, and after it had been extracted they went into liquidation. The pursuer then presented a petition for a charging order under the Law Agents Act on the fund which had been recovered by the action and which had been paid over to the liquidator. It was maintained that the pursuer's proper and only remedy was to claim in the liquidation, but the Court held that as

the liquidation was a voluntary one it did not constitute a bar to enforcing payment of debts and that the creditors in the liquidation were not entitled to the sums recovered by the action in which pursuer acted, except after providing for the legitimate expenses of the agent incurred in recovering the money for them.

D. M.

### IRISH CASES.

The case reported as *Edinburgh Life Association v. Y.* [1911], 1 Ir. R. 306, is a neat decision on a point in the law of evidence. It illustrates the combined operation of two well-known and simple principles:—(1) that evidence of facts merely similar to, but not specifically connected with, the facts in issue, is not generally receivable; (2) that evidence as to matters of substance, which have not been alleged in the pleadings, is generally inadmissible. The action was brought by an insurance company against the defendant, who was assignee of a policy on the life of a third party, claiming to have the policy set aside on the ground that it had been procured by the defendant's fraud. The statement of claim duly gave particulars of the fraud alleged, but only in relation to the one specified policy. At the trial, however, the plaintiff company sought to give evidence showing that the defendant had effected other policies, on the lives of other persons, under similar fraudulent circumstances. The Court held that such evidence would be admissible only if the claim had substantially alleged that the fraud complained of in the present case was part of a system or scheme. To have alleged such a system would not have been "pleading evidence," but stating a material fact. In the absence of such an allegation, the proposed evidence was rejected; but an adjournment was granted for the purpose of enabling the claim to be amended, of course on terms as to costs.

*Bell v. Butterly* ([1911], 1 Ir. R. 312), though primarily a decision as to costs, is noteworthy for a neat statement as to the legal effect of carrying a fund in Court to a separate credit. In a creditor's administration suit, the general assets were insufficient to pay the costs of the suit in full. The executors, who were defendants, claimed priority for their costs as against a secured creditor who had established a charge on a fund realised in connection with a sale in another suit, and brought into Court in the present suit and carried to a separate credit. It was held that they could only claim priority for such of their costs as were relative to the separate account. "The effect of carrying to a separate credit is, that the fund is released from the general questions in the cause, and becomes marked as subject only to the question arising upon the particular matter referred to in the heading of the account."

*Boyle v. Ferguson Ltd.* ([1911], 2 Ir. R. 489), was an action against a company owning motor cars, for a death caused by the negligence of the company's servant. The jury had found that the servant was acting within the scope of his employment at the time; and the question for the Court was, whether the following very special facts amounted to evidence to sustain that finding. The servant in question was the manager of the company's department for the sale of second-hand cars; he was driving with friends of his own, on a Saturday evening, in one of these cars; he often took out second-hand cars without accounting to anyone; the petrol was charged to the defendant company; he said that his being on the road gave him better opportunities of doing business for the firm, but that this time he was driving for his own pleasure. The Court held that the verdict was sustainable. The facts that he was at the time of the accident a servant, and that part of his duty was to drive the car, were in the Chief Baron's view *prima facie* evidence that

he was acting within the scope of his employment, sufficient to cast upon the masters the *onus* of rebutting this inference. Here the inference had not been rebutted, and the evidence as to his uncontrolled discretion in the user of the car, as to the petrol charge, and as to the drive giving him an opportunity of advertising and showing the car, went to strengthen it. The Court threw out a very important suggestion, on which they expressly refrained from deciding, but to which it is submitted that the law on this subject is tending. It is suggested that "scope of employment" must be or may be as extensive as the "authority" given to a servant; so that when a master authorises a servant to use a car for the servant's own purposes, as well as the master's, every user of the car by the servant is deemed user as servant.

*Rylands Glass Co. v. Phoenix Co.* ([1911], 2 Ir. R. 532), is a rather curious little practice-case, dealing with the service of a writ against a company by post. Such a writ could be served by sending it in an ordinary posted letter. In this particular case the sender for greater security registered the letter. The result of registering it was that it was not delivered till a day later than "the ordinary course of post." The plaintiff believed that it had been delivered in the ordinary course of post, and counted the time for entering an appearance from the day when it would have been so delivered. Immediately this time was up, he marked judgment for default of appearance. The Court held that his judgment was marked prematurely—a day too soon—and set it aside: but as he had acted in good faith, they gave no costs against him. He had in fact, by his own conduct, taken his service out of the ordinary course of post.

J. S. B.

## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*The Law and Practice of the Probate Division.* By H. CLIFFORD MORTIMER, B.A., LL.B. London: Sweet & Maxwell. 1911.

Mr. Mortimer is to be congratulated upon his contribution to a subject upon which much has been written. In fact, there seems to be so much law regarding wills that the ordinary man might be forgiven if he were afraid to make his will at all, or if, perchance, driven to desperation, he purchased a penny form from a Law Stationer and trusted to luck. The learned Author brings to his task the experience gained as a practitioner in the Probate and Divorce Division. He has striven, as far as possible, to, as it were, make each section of the book encyclopædic, that is to say, he has aimed at placing in each section all information germane to the point with which it deals. Quite openly he acknowledges his indebtedness to the old text-books on Ecclesiastical Law, to such standard works as Sir Edward Vaughan Williams on Executors, and Tristram and Cooté's *Probate Practice*, and we admire his frankness. The text is divided into four Parts; Part One gives us the law affecting Probate; Part Two deals with "The practice of the Court in non-contentious business;" the Third Part treats of the "Practice of the Court with regard to Caveats, Citations, Summonses and Motions;" and in the Fourth Part we have a dissertation on the "Practice of the Courts in contentious business;" and here Mr. Mortimer's practical experience stands him in good stead. In the notes to the text we find that the judgments cited are given with greater amplitude than is usual; this will be found most useful to country and other practitioners who have not large reference libraries at their command. The Appendix of Precedents of Pleading, is undoubtedly a new and valuable departure in a book on Probate Practice. Many whose names are familiar as legal writers have assisted the learned Author in his work, with advice or otherwise. The Appendices are comprehensive, and the Index is a trusty key to the contents. We gather that this is Mr. Mortimer's first book, and he is to be complimented on it; we shall look with interest for other emanations from his facile pen.

*Judgments in Vacation.* By His Honour Judge V. A. PARRY.  
London: Smith, Elder & Co. 1911.

Judge Parry is well-known as an author, dramatist, and last but not least as an able and experienced County Court judge. He possesses in a high degree the saving grace of humour, which must have been of the greatest value to him in his often depressing day's work. All the essays in this volume are worth reading, but the most important are connected with the County Court. As is natural, the judge has a high opinion of the value of the County Court, and would like to relieve it of much of its function of a debt-collecting agency, so that it might devote more time to the trial of cases, in which direction he would desire to have its jurisdiction considerably enlarged, which desirable consummation has been hitherto hindered by the opposition of the wicked "London lawyers." To carry out the first part of this programme he would alter the law of imprisonment for debt. This is the sanction which has produced the credit system which has been so disastrous to the working classes. The judge is personally in favour of the abolition of imprisonment for debt, but suggests as a measure of practical reform "that no summons should be issued or committal made for a less sum than forty shillings." This proposal he tells us is generally regarded as "a fair experiment which would injure no one but traders who deliberately give credit to the poorer working classes under the sanction of imprisonment for debt." The arguments he puts forward are well worth careful perusal, and the subject is enlivened with stories of many amusing experiences. In these days one remark is particularly worth noting. Judge Parry states that the Select Committee of 1893 reported in favour of imprisonment for debt mainly because the working class uphold it. "They uphold it for one reason—and a powerful one—because without imprisonment for debt there would be no reckless credit, and without reckless credit there would be no possibility of prolonging a strike after their own accumulated funds began to give way." He notes a curious fact connected with his experience of "running down" cases, namely, that a large proportion of witnesses give evidence against the vehicle coming towards them.

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*Annotated Civil Code of Japan.* Vol. IV. By J. E. DE BECKER.  
London: Butterworth and Co. 1910.

This is the volume succeeding those reviewed in our issue of August 1910, Vol. XXXV, No. 357; and it contains the "Book of

Succession." As appropriate to the subject in the romantic mind of the East, the first chapter opens with philosophic reflections that recall Marcus Aurelius. "Life is a gleam of time between two eternities"; "transient as the dew of the morning, and existence but a dream of greater or lesser duration"; "So completely do men pass away from the remembrance of men that the very tombstones over their graves soon crumble away and fail to preserve their names." But the minute care, the labour and polish, bestowed upon the practical parts could not have been exceeded if life had been a possession much prolonged. The notes on the "Meanings of Words" in the original, and the "Explanations" of the translation of each article, are so full of information that an English reader can have no difficulty in clearly comprehending the Code. Some excellent Tables are furnished, and the manner in which the whole work is produced, from the literary material to that of the paper, print and binding, is a credit to all concerned. It stands without competitor as an exposition of Japanese law.

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**Third Edition.** *Church Law.* By B. WHITEHEAD, B.A.  
London: Stevens & Sons. 1911.

This book is in the form of a dictionary, and so can be readily consulted by anyone in search of information. Although quasi-ecclesiastical matters are often affected by statute or decision, it is not often that we get any dealing with matters of doctrine or ritual. We would suggest to Mr. Whitehead that in future editions it might be as well to compile a list of cases together with the pages of the text upon which they occur. In matters of ritual we notice a new decision, declaring the ringing of the "sacring" or one of the Church bells during celebration of Holy Communion, to be illegal, namely, *St. John, Clevedon*, L. R. [1909], P. 6. Among the new cases appear *Rex v. Archbishop of Canterbury*, bearing on the question of objections to bishops. Once more has the rule been laid down in the House of Lords that a question of law, when once decided in a particular way by that tribunal, cannot be decided otherwise. This has an important bearing on Ecclesiastical law, where there are many conflicting decisions. If this rule holds good, then *Hebbert v. Purchas* is still sound law, in spite of inroads made by subsequent decisions, with the result that the "Eastward position," and the "Mixed Chalice" are illegal *per se*. There is little to add with regard to the present edition, except to mention that it has been thoroughly overhauled and brought up to date.

**Fourth Edition.** *Lunacy Practice.* By N. A. HEYWOOD, A. S. MASSEY, M.A., and R. C. ROMER. London: Stevens & Sons. 1911.

The law relating to Lunacy is certainly caviare to the bulk of legal practitioners. At the same time the learned Authors are quite entitled to plume themselves on the necessity of a fourth edition within eleven years, proving the scope for a work of this nature. To the layman a knowledge of the subject is chiefly confined to rare, sensational cases reported in the papers, when the condition of mind of some person is inquired into. All the details of administering the estates of lunatics, the duties of the Government in safeguarding the interests of lunatics, and the work of Masters, Visitors, and Commissioners in Lunacy, are quite unknown to him. A movement is on foot, headed by the Lord Chancellor, with a view to making considerable alterations in the law. A Bill is to be introduced into the House of Lords for the purpose of amalgamating several offices, and of transferring to the Chancery Division the jurisdiction hitherto exercised by the Judge in Lunacy. A Bill has been introduced, and has reached the Second Reading stage in the Commons, for the improvement of the status and conditions of employment of nurses and other asylum officers. Since the publication of the third edition of this work, several important decisions have been made; for example, *Re Baggs* (L. R. [1894], 2 Ch. 416), and *Re S. S. B.* (L. R. [1906], 1 Ch. 713). The anomalous position of receivers as compared to Committees has been rectified by the Lunacy Act 1908. All these matters have received notice in the present edition. The learned Editors record their thanks to Mr. F. A. Corley for revising the precedents of bills of costs, and for drafting the preliminary remarks appended thereto. By reason of his position in the Lunacy Taxing Office, Mr. Corley is well qualified to carry out this important duty. The arrangement of this work shows careful thought and a sense of arrangement, and the Index enables the reader to carry out his investigations with thoroughness and despatch.

**Fifth Edition.** *The Law of Evidence.* By S. L. PHIPSON, M.A. London: Stevens & Haynes. 1911.

It seems a pity that Mr. Phipson's excellent book on the law of Evidence could not be set up in larger type, as the present arrangement is very trying to the reader's eyes, but perhaps it is not so



much the type as the general crowding up of the lines. Some idea of the amount of labour expended in bringing out the present edition may be conveyed by the fact that five hundred new cases have been added, making a total of nearly six thousand cases in all. Evidence is a branch of law not usually much affected by legislation. Lately, however, several statutes have been passed which do affect it. For instance, the Evidence (Colonial Statutes) Act 1907, the Criminal Appeal Act 1907, the Oaths Act 1909. Then comes the important Children Act 1908, with its machinery for Courts to try cases affecting the very young. The previously-mentioned defect is accentuated when the reader refers to the Index, as the headings are in large, heavily-led type, and the sub-heads in small type, crowded together, making the contrast all the more painful to the reader's eyes. Still, the book shows signs of erudition, and careful treatment of a somewhat complex and comprehensive subject, and the learned Author is to be congratulated on the necessity for a new edition.

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**Sixth Edition.** *Leake on Contracts.* By A. E. RANDALL. London : Stevens & Sons. 1911.

This, the latest issue of a treatise which for a third of a century has maintained a leading position as an expositor of the law of Contract, has qualities which advance it beyond the preceding edition. One of these, subordinate but of much value and convenience, is, that references are supplied to all the reports of the cases quoted. This can have been accomplished only by great labour; and the result is that the Table of these cases occupies no less than 277 pages. In the text itself there has also been much revision; and the effect of decisions of the current year are inserted in their appropriate places. As regards the plan of the work, the old and excellent form of division is maintained, but not to the exclusion of minor variations. For instance, with respect to Revocation, Mr. Randall suggests an interesting reconciliation between certain divergent decisions on the doctrine; and the suggestion was founded on a curious event. He read by chance *Kennedy v. Lee* (3 Mer. 441). Probably few people have ever referred to it, nor would the one property of importance in it—an almost casual remark of Lord Eldon—have been likely to arrest the attention of a reader not specially prepared. But Mr. Randall had long had an impression that in the days of George III, it was the theory of Offer and Acceptance that they must synchronize;

and this was confirmed by the Lord Chancellor's words with respect to the case, that "the acceptance must be taken to be simultaneous with the offer, and both together as constituting such an agreement as the Court will execute." If this is admitted as the lost clue, *Byrne v. Tienhoven* may be reconciled, for instance, with *Oxley v. Cooke* or *Dodd v. Dickinson*. The case of *Cornfoot v. Foreke* Mr. Randall consigns to oblivion, probably approving Lord Abinger's dissenting judgment over the governing decision of Barons Rolfe, Alderson and Parke. From some remarks on the doctrine of Mistake, it might be inferred that the Author is not satisfied on some points with the decision in *Lewis v. Clay*. The work is so well known and esteemed that commendation is almost superfluous. In the relevance and the abundance of its illustrations, and the sound deductions from them, it is unsurpassed.

**Sixth Edition.** *Michael and Will on the Law relating to Gas and Water.* By JOSHUA SCHOLEFIELD. London: Butterworth & Co. 1911.

This work has long stood as the premier authority on the subject, and the present issue sustains the established reputation. A valuable feature of it is the general Introduction, which furnishes in a condensed form a progressive history of the two great enterprises; and gives also a list of all the statutory and non-statutory companies which have been purchased by local authorities. No other book, as far as we know, affords this information, and it would be a task of great difficulty to acquire it from the original sources. The Gasworks Clauses Acts and the Waterworks Clauses Acts are set out in full, prefaced by a useful abstract of the contents, section by section. The Metropolis Water Acts and so much of other Acts as concern gas and water are also inserted. Full notes of all important decisions on these enactments are appended to the sections to which they relate. The Index is exhaustive and excellently arranged for easy reference, and that very useful production, the Model Bill both of gas and water, as amended last year, is supplied. Scarcely a question bearing on the two subjects could arise which would not be solved or made plainer by this work.

**Seventh Edition.** *Oakley's Divorce Practice.* By W. M. F. WATERTON. London: Jordan & Sons. 1911.

*Oakley's Divorce Practice* is so well known to the Legal Profession that commendation is scarcely necessary. Again under the

able editorship of Mr. Waterton, he leaves the impress of his experience as Clerk in the Divorce Registry upon the text. Without for a moment aspiring to be a treatise on the law of divorce, at the same time none of the necessary authorities are excluded. The main object of this book is to serve as a concise and practical exposition of the ordinary course of procedure in conducting causes in the Registry. All information necessary to achieving this aim is to be found between the covers, together with a lengthy and complete Table of Cases. Such useful information as tables of fees, statutes, authorised forms, forms of pleading, etc., are all carefully collected and tabulated for the benefit of the reader. In fact Mr. Waterton is to be heartily congratulated upon the result of his efforts to bring this edition thoroughly up to date.

*A Guide to the Law of Betting, Civil and Criminal.* By HERBERT ROWSELL and CLARENCE MORAN. London: Butterworth & Co. 1911.—The Authors believe that there is no contemporary text-book concerned solely with the Law of Betting, and to fill this gap in legal literature they have produced a volume which they trust may be of service to the book-maker and to the man (whom they call the book-maker's client) who solicits Fortune through the book-maker's expedients. With an impartial spirit quite suitable to a sporting subject, they trust also that their labours may be of use to the inspector of police. But the topics treated of are not confined to such as the police are directly inquisitive about, for consideration is given, for instance, to Stock Exchange differences, wagering contracts, deposits, and mortgages falling within the Statutes 9 Anne and 5 & 6 Wm. IV, c. 41. The work conveys the impression of having been carefully prepared; and safe counsel may be found in it by the persons for whom it is provided.

*The German Law of Bills of Exchange and of Cheques.* By SYDNEY LEADER. London: Sweet and Maxwell. 1911.—A translation of the text of so much of the German Commercial Code as affects this portion of negotiable instruments is convenient for those natives of this country whose business with Germany is largely financial. The difference in German law between a cheque and a Bill of Exchange should be well understood.

*The Legal Position of English Companies in Russia.* By L. P. RASTORGOUEFF. London: Jordan & Sons. 1911.—The Author is convinced, from two years' experience in London, that not many secretaries or solicitors of companies having business in Russia are familiar with the regulations affecting the legal position of English companies in that country. And probably he is right. The material presented is well expressed, and beyond doubt should be valuable to the officials for whose enlightenment it is written.

*The Growth of English Law.* By E. S. ROSCOE. London: Stevens & Sons. 1911. One purpose of the Author in this little book is to trace the relation between certain portions of legal history and contemporaneous political and social movements. So much light has been cast on that connection in recent years by Pollock, Maitland, Freeman, Stubbs, and many other writers, and by the publications of the learned Societies, that original research is almost exhausted and original views difficult of elaboration. But this work puts forth an excellent account of what has been the result of those original investigations, and is besides a very readable book. The long chapter on Forestal Laws and the forests of the Middle Ages is particularly interesting.

**Third Edition.** *The Criminal Law Amendment Act.* By FREDERICK MEAD and A. H. BODKIN. London: Butterworth & Co. 1911.—A new edition of this useful little work was much required, and the present one has been produced by the two experienced criminal lawyers who were the Authors of the work. The present volume is intended to give the Statute and Case law relating to indecent offences against Women and Children, and acts of gross indecency between males. It includes the Criminal Law Amendment Act 1885; Parts II, IV and VI of the Children Act 1908; and the Incest Act 1908. All these Acts are very fully annotated, not only with references to other statutes and cases, but also with comments suggested by the Authors' great experience. We might particularly call attention to the long and critical note on the proviso to sect. 1 of the Incest Act 1908, showing the difficulties and inconsistencies which the proviso may cause. We are rather surprised to find a quotation on Corroboration from so old an edition as the fourth of *Best on Evidence*, which not many lawyers are likely to have on their shelves; perhaps it is an oversight!

**Third Edition.** *The Stamp Laws.* By SIR N. J. HIGHMORE. London: Stevens & Sons. 1911.—It is not given to many people to apply from the wells of memory alone an instant solution to every question that may arise under the Stamp Acts and the numerous subsequent Finance and Revenue Acts; and to the vast majority with incomplete knowledge a reliable reference book up to date will be a welcome support. From the eminent official position of the Author he is warranted in his trust "that the book will be found a very complete Treatise on the subject"; and from a fair examination of the work he seems to be fully justified in his hope. Two useful Tables are set out in the Appendix: one showing the correspondence between the Stamp Act of 1870 and the antecedent law; and the other showing the correspondence between the Act of 1891 and, mainly, such parts of the antecedent law as have been altered since the Act of 1870. Probably there is no current book on the subject more complete than this one.

**Fifth Edition.** *Stevens's Elements of Mercantile Law.* By HERBERT JACOBS. London: Butterworth & Co. 1911.—This is a book prepared as a text-book for accountancy students, and the first consideration is given to their requirements. As those requirements cannot demand a minute knowledge of the intricate questions of so far-reaching a subject as mercantile law, the treatment is necessarily and wisely in general outline. But though the explanations are condensed, they are, as far as they can go, clearly expressed on such branches as contract, joint stock companies, negotiable instruments, insurance in all its branches, carriage by land and sea, shipping, stock exchange transactions, and the sale of goods.

## CONTEMPORARY FOREIGN LITERATURE.

*La Recidiva.* By GIACOMO MATTEOTTI. Turin, 1910.—This ponderous volume is one of the *Riblioteca Antropologico-Giuridica* series. It gives with minute thoroughness the statistics of recidivism and the conclusions to be drawn therefrom, of which the main one is that it tends to diminish. Certain crimes tend to be repeated more than others. English authorities are cited, mainly Bentham, Davenport Hill, Howard, Herbert Spencer, Stephen, and Tallack. At p. 121 is the strange hybrid *Verbrechercasino*.

*Il Diritto come Norma Tecnica.* By A. RAVÀ. Cagliari, 1911. — The separation of law from ethics—probably of German origin—does not seem complete in Italy. This work attempts to show that the *norma* or sanction affords a test of the category to which an act belongs.

*Tra il Burlamachi e il Rousseau.* By GIORGIO DEL VECCHIO. Ortona a Mare, 1910.—A brief examination of Rousseau's debt to Burlamachi in his political theories.

*Les Torts ou Délits Civils en Droit Anglais.* By ADRIEN GÉRARD. Laval, 1910.—This is an exceptionally good thesis for the doctorate at Rennes. The author takes for his motto the well-known words of the Church Catechism, "To hurt nobody by word or deed." The information is interesting and correct and must have been the result of much study and labour. The leading English text writers are referred to in the bibliography and notes, but some of the better known cases are not cited in fact, the table of cases is rather meagre.

*Justiz—und Urkundenverhältnisse in Rumänien.* By Dr. VLADIMIR PAPPAEVA. Vienna, 1911. The Author starts with the promise of justice made in 1866 by Prince Charles on his accession, and follows with a historical study leading to the existing law, and based on the *Droit ancien et moderne* of Professor Alexandresco of Jassy. The successive codes were based chiefly on the text books of the Lower Empire, that compiled by Meletias in 1652, *Pravutawa mare san Indreptare Legei*, being the earliest.

#### PERIODICALS.

*Zeitschrift für Internationales Recht.* Vol. XXI. Leipzig, 1911. Dr. Fink contributes a well-reasoned article on liability for collision at sea (p. 101). One on maritime prize by Herr Posse contains a very full bibliography on the subject of naval prize (p. 123).

*Blätter für vergleichende Rechtswissenschaft und Volkswirtschaftslehre.* Berlin, July, 1911.—The more interesting of the contents are an article on the recent Parliament Bill in England and another on the proposed new code for Servia.

*Deutsche Juristen-Zeitung.* Berlin, 1 July—15 Sept. 1911.—Professor Kohler writes on what has been frequently noticed by

American jurists, the decay of precedent as a ground of judgment in the United States (p. 918). Zola's law is attacked at p. 923. There is an account of the celebration of the centenary of the University of Breslau, at which the faculty of law was strongly represented. Eichhorn appears to have been the most distinguished legal name connected with Breslau (p. 974). The honorary degrees on the occasion included Dr. Murray Butler, of Columbia University, N.Y.; Dr. Fitting, who has recently had his eightieth birthday appreciations, and is now the doyen of law teachers in Germany; and Dr. Otto Gierke.

*La Giustizia Penale.* 29 June—17 Aug. Rome, 1911.—Prescription of crimes, almost unknown in England, is of frequent occurrence as a ground of decision in Italy. Five years is the usual time. See an example at p. 1009. Proceedings were taken against a priest for reciting at a funeral the prayers for the dead so as to be heard beyond the churchyard (p. 988). The Court of Cassazione declared that in Article 299 of the penal code the word *o* (or) was conjunctive and not disjunctive. The editor caustically remarks that the Court took a course contrary to that of the Emperor Claudius. He added three letters to the alphabet, he abolished one (p. 1033).

JAMES WILLIAMS.

Books received, reviews of which have been held over owing to want of space:—*Chitty's Statutes*, Vols. I & II; *The Law of England*, Vols. XVII & XVIII; *The Annual Practice*; *A.B.C. Guide to Practice*; *Green's Law for the American Farmer*; *Veicamer's Juridiction Mixte Egyptienne*; *Yearly Practice of the Supreme Court*; *Digest of Law Journal Reports and of the Law Reports 1906-10*; *Ashburner on Mortgages*; *Maude's Justice's Handbook on Evidence*; *Ashworth's English Constitutional History*; *Hanson's Death Duties*; *McCall's Business of Congress*; *Hill's World Organization*; *Bluff's Guide to the Bar*; *Bentwich's Law of Domicile and Succession*; *Allan's Housing of the Working Classes Acts*; *Brett's Leading Cases in Equity*; *Odgers' Libel and Slander*; *Wicker's Neutralization*; *Spencer's Municipal Origins*; *Cockle's Leading Cases on Evidence*; *Schuster's The German Commercial Code*; *Welford & Otter-Barry's Law of Fire Insurance*; *de Beer's Analysis of Salmond's Jurisprudence*; *Dixon's Commercial Law*; *Spencer's Agricultural Holdings Act 1908*; *Questions and Answers from the "Justice of the Peace."*

Other Publications received:—*Cambridge Diary for the Academical Year 1911-12* (Cambridge University Press); *Powell's Lawyer's Remembrancer* (Butterworth & Co.).











